Applicant Details

First Name	**Maeve**
Last Name	**McBride**
Citizenship Status	**U. S. Citizen**
Email Address	**maeve_mcbride@law.gwu.edu**
Address	**Address** **Street** **18 Snows Ct NW** **City** **Washington** **State/Territory** **District of Columbia** **Zip** **20037** **Country** **United States**
Contact Phone Number	**5672773253**

Applicant Education

BA/BS From	**Dartmouth College**
Date of BA/BS	**June 2020**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 19, 2024**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**George Washington Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Smith, Peter
pjsmith@law.gwu.edu
(301) 907-4392
Collins, John
jcollins40@law.gwu.edu
Valdez, Tania
tania.valdez@law.gwu.edu
Suter, Sonia
ssuter@law.gwu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Maeve McBride
18 Snows Ct, Washington, DC 20037 | (567) 277-3253 | maeve_mcbride@law.gwu.edu

June 11, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Norfolk, VA

Dear Judge Walker:

I am a law student at The George Washington University Law School and will be graduating in May 2024. I am writing to apply for a judicial clerkship with you for the 2024 Term. I am enclosing a resume, law transcript, and a writing sample. Also enclosed are recommendations from Professors Peter Smith, Sonia Suter, JP Collins, and Tania Valdez. Thank you for your consideration.

Sincerely,

Maeve McBride

Maeve McBride
18 Snows Ct, Washington, DC 20037 | (567) 277-3253 | maeve_mcbride@law.gwu.edu

EDUCATION

The George Washington University Law School — Washington, DC
J.D., expected — May 2024
Honors: George Washington Scholar (Top 1%-15% of class to date); GPA: 3.993
Dean's Recognition for Professional Development
Journal: *The George Washington Law Review*, Managing Editor
Activities: Research Assistant to Professor Tania Valdez (Spring 2023);
Teaching Assistant to Professor Tania Valdez (Fall 2022);
Peer Tutor (Civil Procedure);
Student Health Law Association (Member)

Dartmouth College — Hanover, NH
B.A., *cum laude*, in Anthropology — June 2020
Honors: Third Honor Group; GPA: 3.76
Leadership: Access Dartmouth, a campus organization dedicated to disability advocacy (Founder and Treasurer);
Kappa Delta Sorority (Vice President Operations);
Activities: Dartmouth Outing Club Ledyard Canoe Club; Dartmouth Museum Club

EXPERIENCE

Covington and Burling — Washington, DC
Summer Associate — May–July 2023
- Researched legal issues including civil procedure, and legislative history
- Communicated legal research and analysis to attorneys through legal memoranda and oral presentations

U.S. District Court for the District of Columbia — Washington, DC
Judicial Intern, Chambers of the Honorable G. Michael Harvey, Magistrate Judge — January–April 2023
- Researched legal issues including administrative law, and procedural issues
- Communicated legal research and analysis to clerks and the judge through legal memoranda

Public Defender for Arlington County — Arlington, VA
Legal Intern — September–November 2022
- Researched legal issues including statute of limitations, restitution, and penalties
- Worked collaboratively with interns, attorneys, and other staff to draft motions to the court

Shumaker, Loop and Kendrick — Toledo, OH
Summer Associate — May–July 2022
- Researched and drafted memorandum on proposes SEC rules
- Drafted due diligence report for company acquiring manufactured home parks throughout Ohio

Ottawa Hills Elementary School — Toledo, OH
Paraprofessional — August 2020–June 2021
- Worked in tandem with teachers to plan and execute daily activities for struggling readers

INTERESTS

- Visiting art museums
- Watching F1 and College Football (Go Bucks!!)

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G49933196
Date of Birth: 23-MAY

Date Issued: 05-JUN-2023

Record of: Maeve McBride

Page: 1

Student Level: Law
Admit Term: Fall 2021

Issued To: MAEVE MCBRIDE
MAEVE_MCBRIDE@GWU.EDU

REFNUM:5600739

Current College(s):Law School
Current Major(s): Law

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
	Law School		
	Law		
LAW 6202	Contracts Morant	4.00	A
LAW 6206	Torts Suter	4.00	A+
LAW 6212	Civil Procedure Smith	4.00	A+
LAW 6216	Fundamentals Of Lawyering I Collins	3.00	A
Ehrs 15.00	GPA-Hrs 15.00	GPA 4.178	
CUM 15.00	GPA-Hrs 15.00	GPA 4.178	
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			
Spring 2022			
	Law School		
	Law		
LAW 6208	Property Roberts	4.00	B+
LAW 6209	Legislation And Regulation Smith	3.00	A+
LAW 6210	Criminal Law Cottrol	3.00	A
LAW 6214	Constitutional Law I Fontana	3.00	A-
LAW 6217	Fundamentals Of Lawyering II Collins	3.00	A
Ehrs 16.00	GPA-Hrs 16.00	GPA 3.833	
CUM 31.00	GPA-Hrs 31.00	GPA 4.000	
Good Standing			
DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2022			
	Law School		
	Law		
LAW 6230	Evidence Durrer	3.00	A
LAW 6397	Federal Indian Law Alexander	2.00	A
LAW 6526	International Trade Law Charnovitz	2.00	A
LAW 6668	Field Placement Mccoy	3.00	CR
LAW 6671	Government Lawyering Williams	2.00	A
Ehrs 12.00	GPA-Hrs 9.00	GPA 4.000	
CUM 43.00	GPA-Hrs 40.00	GPA 4.000	
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			
Spring 2023			
LAW 6218	Professional Responslbty/Ethic	2.00	A-
LAW 6360	Criminal Procedure	4.00	A
LAW 6400	Administrative Law On	3.00	A+
LAW 6595	Race, Racism, And American Law	2.00	A-
LAW 6667	Advanced Field Placement	0.00	CR
LAW 6668	Field Placement	3.00	CR
Ehrs 14.00	GPA-Hrs 11.00	GPA 3.970	
CUM 57.00	GPA-Hrs 51.00	GPA 3.993	
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			
Fall 2022			
	Law School		
	Law		
LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	
Spring 2023			
LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	

********** CONTINUED ON PAGE 2 **********

Katie Cloud
Interim University Registrar

This transcript processed and delivered by Parchment

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G49933196
Date of Birth: 23-MAY

Date Issued: 05-JUN-2023

Record of: Maeve McBride

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2023			
LAW 6234	Conflict Of Laws	3.00	----------
LAW 6236	Complex Litigation	3.00	----------
LAW 6300	Federal Income Taxation	3.00	----------
LAW 6394	Sexuality And The Law	3.00	----------
LAW 6658	Law Review	1.00	----------
	Credits In Progress:	13.00	

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	57.00	51.00	203.67	3.993
OVERALL	57.00	51.00	203.67	3.993

########## END OF DOCUMENT ##########

Katie Cloud
Interim University Registrar

This transcript processed and delivered by Parchment

Office of the Registrar
THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

NOTICE TO RECIPIENT

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DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
		NVCC	Northern Virginia Community College
CU	Catholic University of America	PGCC	Prince George's Community College
GC	Gallaudet University	SEU	Southeastern University
GU	Georgetown University	TC	Trinity Washington University
GL	Georgetown Law Center	USU	Uniformed Services University of the Health Sciences
GMU	George Mason University		
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added*: A-, B+, B-, C+, C-, D+, D-.*
Effective Summer 1980: The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System

H, Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit http://www.gwu.edu/transcriptkey

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write enthusiastically in support of Maeve McBride, a student at George Washington Law School who has applied to clerk in your chambers. Maeve is the Managing Editor of the Law Review and one of the very top students in her class. Maeve was a student in my Civil Procedure class in Fall 2021, and I thought, after taking into account class participation and exam performance, that she was the best student in the class. It did not surprise me that she earned an A+ on the exam. Although Maeve is not the type of student who volunteers simply so that she can hear herself speak, I always knew that I could turn to her when the class was struggling with a difficult concept. Her comments were always incisive, insightful, and right on the mark. As a teacher, it is impossible to overstate the value of such students to the educational process. Maeve is intellectually curious and engaged, which makes her seem more mature than her classmates. Maeve repeated her performance in my Legislation and Regulation class in Spring 2022, in which she earned another A+.

Maeve's performance in my classes, apparently, is the norm for her. Maeve's GPA is 4.00, which puts her at the very top of the class. GW has a stricter curve than most of its peer institutions, which makes Maeve's performance all the more impressive.

Maeve has maintained this singular level of academic achievement while serving as the Managing Editor of the Law Review. The Managing Editor basically runs the journal day to day. The position requires excellent organizational skills and unflappability. Maeve's peers, who elected her to the position, obviously have great faith in her leadership abilities. In addition to her duties on the Law Review, Maeve did externships both semesters during her second year—at the Public Defender's office in Arlington in the Fall and for Magistrate Judge Harvey in the Spring—and during the Spring of her first year (at the Mid-Atlantic Innocence Project, work that is continuing), which makes her academic performance all the more stunning.

Indeed, Maeve will arrive at a clerkship with significant legal experience. She was a summer associate after her first year of law school at Shumaker, a law firm in Toledo, Ohio (where Maeve is from), where she worked on a range of matters. She is spending her second summer at Covington and Burling in Washington, DC.

Finally, Maeve strikes me as an amiable and decent person. She is energetic and thoughtful, and she will fit in well in any judge's chambers. I have no doubt that Maeve will have a successful and productive career in the law. She is one of our very best, and I strongly endorse her clerkship application. I hope that you will consider her carefully. Please do not hesitate to contact me if you have any questions.

Sincerely,

Peter J. Smith
Arthur Selwyn Miller Research Professor of Law

(202) 994-4797

pjsmith1@law.gwu.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Maeve McBride to serve as your law clerk. Maeve was a truly exceptional student in my first-year Fundamentals of Lawyering course. Our small class size and seminar-style format allowed me to get to know Maeve both as a student and a person, and I know her well enough to recommend her for a clerkship in your chambers without condition.

There's only one word I can think of to describe Maeve's performance in my class and in law school more generally: extraordinary. Maeve was always prepared for class, she met every deadline, and she regularly (and helpfully) participated in class discussions and exercises. She is a clear and calm communicator. Her writing is no-nonsense—it's focused and precise and gets to the heart of the issue up front. Maeve's graded written work—graded blindly—placed her at the top of the class in both semesters, earning an "A" grade in each.

Maeve has been equally impressive elsewhere in law school. With remarkable consistency, she has earned a perfect 4.0 GPA over three semesters. Maeve's choice in classes reflects her commitment to prepare for similar success as a law clerk at any level. She has taken evidence and is currently taking administrative law and criminal procedure. She is also a member of the Law Review, and is currently writing a student note that proposes bold changes to the way lawyers evaluate conflicts of interest. Her paper convincingly argues that we should shift away from automatic conflicts and instead focus on genuine risk that client confidential information will be shared so that clients have more power to choose their lawyers. She will serve as a Managing Editor of the Law Review next year, which will only improve her already strong writing, editing, and time management skills.

Maeve also understands the role of a law clerk. This semester, she interned for the Honorable Michael Harvey of the U.S. District Court for the District of Columbia, which gave her valuable insight into the dynamics of a judge's chambers—a small, closely-knit group of people working together to ensure that the judge's docket runs smoothly and efficiently. She knows the importance of meeting deadlines, of paying attention to detail, and of creating a trusting relationship with the judge and other chambers staff. And she understands that the clerk's work product represents the judge and so requires the highest standards of excellence.

As you know, law school success isn't everything. Maeve is also a genuinely good, caring, and empathetic person. Despite her tremendous success, she remains true to her humble suburban Ohio upbringing. During one of our conversations, she described that she had a middle-class childhood with "the kind of parents who told you to go outside and find the neighborhood kids if you were bored." To me, that really captures Maeve's self-starter spirit. Her interests are varied. She reads historical fiction and fantasy novels. She loves the museums here in DC and watching true crime documentaries on Netflix. All of that is to say that has the character and personality to make a positive impact in chambers.

In short, Maeve possesses in spades many qualities that would make her an excellent judicial law clerk. She has the legal acumen, the analytical abilities, the writing skills, and the personal qualities to handle the rigors of the job. She is also kind, generous, and upbeat. I am sure that she would be a welcome addition to your law clerk family. I recommend her to you without reservation, and welcome any further inquiry you may have about her.

Sincerely,

John P. Collins, Jr.
Visiting Associate Professor
The George Washington University Law School
(202) 994-0672 (office)
(845) 216-9940 (mobile)
jcollins40@law.gwu.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am very pleased to submit this letter in support of Maeve McBride's application for a clerkship in your chambers. By way of introduction, I am an Associate Professor of Law at the George Washington University Law School (GW Law). Maeve was my Teaching Assistant (TA) for both of my Torts classes during the Fall 2022 semester, and I was so impressed with her that I hired her as my Research Assistant (RA) as well. She is still employed as my RA, and I hope to keep her on my research team as long as possible.

Prior to my current position, I taught in clinical programs at Berkeley Law, Denver Law, and Villanova Law. I also served in federal courts as a law clerk and staff attorney. I have taught and intensely supervised many law students over the past 12 years, and Maeve stands out as one who I believe will be particularly successful as a judicial clerk. Maeve is a stellar student with a bright future ahead, and I cannot recommend her highly enough.

I initially met Maeve because I began my position at GW Law this past semester and needed to hire a TA. I contacted one of my colleagues, Professor Sonia Suter, to ask if she had any past students she would recommend. Professor Suter responded with enthusiastic praise about Maeve, so I contacted, interviewed, and hired Maeve shortly before the semester started. Maeve's TA duties included attending two of my Torts classes per week, researching current events related to class topics, drafting hypotheticals for me to use in class, holding TA office hours, and holding review sessions prior to the midterm and final exam in order to share strategies related to preparing for law school exams. Students reported that her sessions were very helpful in orienting them to law school and developing new study habits. Maeve had many other things on her plate last semester, including an internship on top of her regular coursework, yet she was always available to assist with anything I needed. She is efficient without losing thoroughness, which is a rare quality.

As the fall semester was coming to a close, I asked Maeve if she would stay on as my research assistant. I write in the area of immigration law, which Maeve had not yet studied, but I had no concerns about her ability to get up to speed because she interested in a variety of topics and is a fast learner. Some law students shy away from areas of law they have not yet encountered in their studies, but Maeve seems to enjoy diving into complex and multi-faceted problems in any area. As I expected, her work as an RA has been excellent. Maeve has been reading numerous cases from the Board of Immigration Appeals and analyzing the outcomes of decisions related to disability. She has picked up on interesting patterns in the cases, beyond what I would expect a law student to notice, and has even recommended new research paths to me.

Maeve has proven that she is skilled at legal research, as she has assisted multiple times when I have struggled to find data or legal resources for my projects. I have sent Maeve numerous requests for help researching issues over the course of the semester, and she has always responded promptly and either found exactly what I needed or provided a thorough explanation of her efforts and suggestions for other paths to pursue. Maeve also volunteers for the non-glorious tasks, like Bluebooking. In fact, she turned around footnote edits on a 70-page draft on short notice when I had a deadline approaching. Lastly, Maeve is a kind and collegial person who works well either on her own or on teams. My RAs have collaborated on a few group projects this semester and they seem to get along well and divide responsibilities in an equitable fashion. My sense is that Maeve would contribute to a harmonious and collaborative work environment.

I hope my comments here have captured that Maeve is highly intelligent, self-motivated, diligent, intellectually curious, and collegial. She would be a wonderful addition to any chambers, and I recommend her without reservation. If you have any questions or need additional information, please feel free to contact me at tania.valdez@law.gwu.edu.

Sincerely,

Tania N. Valdez
Associate Professor of Law
The George Washington University Law School

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing in enthusiastic support of Maeve McBride's application to serve as one of your law clerks. Maeve was a student in my Torts class her first semester of law school. Based on my knowledge of her as a student and person, I am highly confident that she would make an outstanding law clerk.

Maeve stood out from the first day of class in Torts. In a large class of 123 students, she was an extremely active and serious participant in classroom discussions. It was clear that she was confident and not the least bit cowed by speaking in a group of over 100 students. Maeve consistently asked excellent and incisive questions and often provided thoughtful answers that demonstrated a very strong grasp of the material and its complexities. Her comments in class revealed her bright, analytic mind and her desire not only to learn the legal principles, but also to understand the rationales and policies behind them.

I fully expected Maeve to perform well on the final examination, which she did by earning the highest overall score in the class. The examination included a long, issue-spotting question for which she earned the very highest grade with a score 3.23 standard deviations above the mean. I wrote a note to myself (before adding up the scores or knowing the identity of the author) that the essay was extremely strong. I noted that it didn't miss a single issue and was likely to earn one of, if not the, highest scores. And indeed, it did. Her writing was extremely clear, and her organization was excellent. What's more, she was able to see all of the larger and more nuanced legal issues presented by the complicated fact pattern. It was truly one of the best first-year final examination essays I have graded in more than twenty years of teaching.

She also did very well with the multiple-choice questions, which required a good deal of reading and analytical reasoning. Her score for that portion of the exam was 1.71 standard deviations above the mean, leading to an overall score that was 2.62 standard deviations above the mean. Maeve's overall exam performance demonstrated her thorough knowledge of the material; ability to identify legal issues in new fact patterns; capacity to articulate arguments on both sides; and ability to express her ideas clearly, coherently, and thoughtfully. I rarely award A+ grades. But based on her outstanding exam performance and excellent class participation, she deserved no less than an A+ for the class. It is evident that her performance in Torts was not a fluke; thus far, she has earned nothing but some form of an A grade in all of her classes, with the exception of a single B+.

Based on my knowledge of Maeve, she was the first student who came to mind as a potential teaching assistant when a new colleague asked for recommendations of former students. Had I not been on sabbatical last fall, I would have offered the position to Maeve myself.

For the same reasons I recommended Maeve as a teaching assistant, I know she would be an excellent law clerk. The fact that she wrote such a fine exam in the high-stress and time-pressured setting of a final examination is powerful evidence that she has the strong writing and analytic skills required for a clerkship. She also grasps the nuances of legal concepts and ideas that many students miss, something that she demonstrated repeatedly in class discussions and on the final exam. In addition, she is careful and thoughtful in her reasoning. I am confident that she will be conscientious, efficient, and thorough in her work as a clerk. What's more, she will also be eager to discuss legal issues with co-clerks and a judge as evidenced by her strong engagement in class.

In addition to being highly intelligent, thoughtful, diligent, and hardworking, Maeve is also confident without being arrogant. She organized a lunch with me and some of her peers when she was taking Torts, and I found her very conversational, engaging, and mature. The fact that she was selected to be the Managing Editor on the George Washington University Law Review demonstrates that she gets along well with her peers and is also well-respected.

For all of these reasons, I am highly confident that Maeve has exactly the qualities one would want in a law clerk and lawyer. She has an active, lively, and intellectual mind; she expresses her thoughts in writing and orally with exceptional clarity and organization; and she has a very strong work ethic. Moreover, I have no doubt that she will get along well with peers, support staff, and supervisors alike. Given her many strengths, I am sure that you would be very pleased to hire her as your law clerk.

If you have any other questions about Maeve's application and abilities, I would be happy to speak with you. Please feel free to contact me at (202) 994-9257 or ssuter@law.gwu.edu.

Sincerely,

Sonia M. Suter, J.D., M.S.
Professor of Law
Kahan Family Research Professor of Law
Henry St. George Tucker III Dean's Research Professor of Law
Founding Director, Health Law Initiative

The following writing sample is an essay prepared to fulfill the advance writing requirement through the *George Washington Law Review*. The essay discusses the problems of applying The Model Rules of Professional Conduct about conflict of interests to modern global megafirms. I received feedback on this essay and some aid in proofreading, however, the content and structure are entirely my own.

Maeve McBride
18 Snows Ct, Washington, DC 20037 | (567) 277-3253 | maeve_mcbride@law.gwu.edu

The Rules are Swiss to Me: Adjusting the Model Rules of Professional Conduct to Better Reflect the Risk of Concurrent Conflict of Interest at Global Megafirms

Abstract

The Model Rules of Professional Conduct were adopted in 1983. In the 40 years since their adoption, legal practice has changed dramatically. Firms have grown to unprecedented size, with the largest firms having well over 1000 lawyers working at offices around the globe. Some firms have also adopted Swiss verein structures which allow loose affiliations of smaller organizations to operate under a single brand. These changes in legal practice have drastically changed the risk to clients based on concurrent conflicts of interest. This Note advocates revising the Model Rules to allow for more flexibility in declaring concurrent conflicts of interest and imputation so that the rules better reflect the differing risks posed by law firms of various structures. In Part II the note explores the text and comments to Model Rule 1.7(a) and Model Rule 1.10. Part II also examines scholarly perspectives on the successes and failures of the Model Rules about conflicts of interest. Part III summarizes the growth of international megafirms, discusses the Swiss verein structure employed by some firms, and explores how the Model Rule 1.7(a) and Model Rule 1.10 have been applied to firms structured as Swiss vereins. Part IV discusses the how Model Rule 1.7(a) and Model Rule 1.10 are overinclusive in the context of firms structured as Swiss vereins. Part IV also proposes a modification to Model Rule 1.7(a) that incorporates Model Rule 1.10 and focuses the inquiry on the risk to clients before discussing how the proposed rule would have been applied to cases introduced in Parts I and II.

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I. Introduction

In a recent case, Dentons US LLP (Dentons US) paid $32 million for a malpractice judgement stemming from a disqualification based on conflicts of interest.[1] $32 million is a steep price for the firm, but the client Dentons once worked for also never got the relief they sought, patent protection in international trade.[2] The International Trade Commission (ITC) applied the Model Rules of Professional Conduct in the initial disqualification, but those Model Rules were ill equipped to handle the case presented.[3] The Model Rules automatically impute the conflicts of one lawyer across the entire firm, unless those conflicts stem from personal responsibilities of the lawyer or the conflicts are waived, without critically examining the risk posed to clients based on the size of a firm or how it is structured.[4] Therefore Dentons, a firm with well over 10,000 lawyers around the world,[5] was treated identically to a small firm where all the lawyers know one another.

The Model Rules have been updated and amended, but the structure and content has largely persisted over the nearly 40 years since the Rules were adopted.[6] The Model Rules specifically pertaining to conflict of interest have barely been changed in that time frame, but the structure of firms and risk to clients based on conflicts of interest has.

The Model Rules address conflicts of interest with many individual rules. The most important rules in the context of this Note are Rule 1.7 and Rule 1.10. Rule 1.7(a) defines concurrent conflicts of interest and prohibits lawyers from representing a client when

[1] *See infra,* Part III.
[2] *RevoLaze LLC v. Dentons US LLP*, 191 N.E.3d 475, 475 (Ohio 2022).
[3] *See infra*, Part III.
[4] MODEL RULES OF PRO. CONDUCT r. 1.10 (AM. BAR ASS'N 1983).
[5] Dentons, "Dentons Reaches milestone of 10,000 lawyers," (May 14, 2019), https://www.dentons.com/en/about-dentons/news-events-and-awards/news/2019/may/dentons-reaches-milestone-of-10000-lawyers.
[6] See AMERICAN BAR ASSOCIATION, *Model Rules of Professional Conduct*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (last visited Nov. 12, 2022) for a list of when the rules have been amended or changed.

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representation would create a concurrent conflict of interest.[7] The two types of concurrent conflict of interest defined by the rule are conflicts based on direct adversity, and conflicts based on a significant risk of material limitation.[8] Model Rule 1.7(b) provides for a lawyer to bypass Rule 1.7(a) if the lawyer receives informed consent from both parties.[9] Model Rule 1.10 imputes individual lawyer's conflicts of interest arising under Rule 1.7 across a firm unless the conflict is based on a personal interest of the disqualified lawyer.[10]

Despite the Model Rules relative stagnation, the practice of law has evolved significantly since 1983.[11] The modern international mega firm is not the same as the small firm practicing in one office the 1983 Model Rules were designed for.[12] This leaves megafirms without clear, well designed, applicable rules especially in the area of conflicts of interest.

When the current Model Rules are applied to global megafirms, the actions of hundreds of lawyers, some of whom have never met, get imputed across the entire firm. This can lead to absurd outcomes that fail both the lawyers and the clients. In the Dentons case, the lawyers had to pay the malpractice judgement, and the clients faced with the prospect of finding new lawyers with experience in international trade and patents, lost their third-party funding agreement, and never received the patent protection they sought.[13]

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[7] MODEL RULES OF PRO. CONDUCT r. 1.7(a) (AM. BAR ASS'N 1983).
[8] *Id. See also*, *infra* Part II.
[9] MODEL RULES OF PRO. CONDUCT r. 1.7(b) (AM. BAR ASS'N 1983) "Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or tother proceeding before a tribunal; and (4) each affected client gives informed consent in writing."
[10] MODEL RULES OF PRO. CONDUCT r. 1.10 (AM. BAR ASS'N 1983).
[11] *See e.g.*, Cassandra Robertson, *Conflicts of Interest and Law Firm Structure*, 9 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 64, 67 (2018), Janine Giffiths-Baker & Nancy Moore, *Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time?*, 80 FORDHAM L. REV. 2541, 2543 (2012), Geoffrey Hazard, *Imputed Conflict of Interest in International Law Practice,* 30 OKLAHOMA CITY U. L. REV. 489 (2005).
[12] *See* Robertson, *supra* note 11, at 72-74.
[13] *RevoLaze LLC v. Dentons US LLP*, 191 N.E.3d 475, 475 (Ohio 2022).

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This Note examines and addresses the quagmire that is conflict of interest at global firms and proposes combining and simplifying the Model Rules on concurrent conflict of interest and imputation of conflicts.[14] Part II examines how the Model Rules about concurrent conflicts of interest and explores the stated purposes of the Model Rules. Part III examines how the Model Rules about concurrent conflicts of interest are negatively impacting international firms and their clients through a series of case studies. Part IV explores the failures of the current Model Rules and proposes a more effective streamlined rule for dealing with concurrent conflicts of interest. The new rule would modify Model Rule 1.7(a) and combine it with Model Rule 1.10 to create a rule that effectively governs international megafirms without substantially changing how the rules apply to smaller firms. The changes allow for flexibility to consider how the structure of a firm The proposed language reads, "A Lawyer shall not represent or continue to represent a client if the representation creates a concurrent conflict of interest. A concurrent conflict of interest exists where there is a significant risk that the interests of the lawyer, or law firm, including the duties to a client, former client, or third party of the lawyer, or law firm, will materially and adversely affect the representation of the client, except as permitted in (b)."

II. The Rules About Concurrent Conflicts of Interest and Legal Ethics

The American Bar Association (ABA) adopted the Model Rules of Professional Conduct in 1983 as a comprehensive update to the Model Code of Professional Responsibility.[15] The Model Rules have been amended twenty-one times in the forty years since they were first adopted.[16] The most recent amendments, in 2020 and 2021, concerned the representation of indigent clients

[14] This Note is exclusively focused on conflicts of interest in civil matters and does not address conflicts of interest in criminal litigation or the relationship between conflicts of interest and the Sixth Amendment. Furthermore, although this Note makes passing reference to conflicts of interest in transactional matters, this Note focuses on conflicts of interest in litigation matters. Finally, this Note does not address conflicts that arise as lawyers transition from one firm to another or between government work and firm work.
[15] MODEL RULES OF PRO. CONDUCT preface (AM. BAR ASS'N 1983).
[16] *Id.*

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and registration as in house counsel.[17] There have been no significant updates to Model Rule 1.7 or Model Rule 1.10.[18] The Model Rules are just that, a model for States to adopt, but every state has adopted the Model Rules in whole or in part.[19] Though the Model Rules are technically not binding, they can be used as guidance when Federal Courts evaluate motions based on legal ethics including motions to disqualify.[20] This Part addresses the function and purposes of the Model Rules related to conflicts of interest.

The complicated structure and importance of Conflicts of Interest in legal ethics can be seen by the sheer number of rules related to the subject. Model Rule 1.7 Conflict of Interest: Current Clients, Model Rule 1.8 Conflict of Interest: Current Clients: Specific Rules, Model Rule 1.9 Duties to Former Clients, and Model Rule 1.10 Imputation of Conflicts of Interest: General Rule all focus on the ethics of conflicts of interest. This Note will primarily focus on Model Rules 1.7, and 1.10 – the Model Rules which focus on Duties to Current Clients and Imputation.

Model Rule 1.7(a) defines and prohibits concurrent conflicts of interest.[21] The rule, like all conflicts of interest rules, is intended to protect the "loyalty and independent judgement" of lawyers.[22] It prohibits conflicts where "the representation of one client is directly adverse to

[17] *Id.*
[18] *See* AM. BAR ASS'N, *Model Rules of Professional Conduct*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (last visited Nov. 12, 2022) (listing significant updates to the Model Rules but not listing any updates to 1.7).
[19] See AM. BAR ASS'N, *Alphabetical List of Jurisdictions Adopting Model Rules*, American Bar Association (Mar. 28, 2019) https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ for a complete list of when each state adopted the Model Rules.
[20] *See e.g.,* Horaist v. Doctor's Hosp. of Opelousas, 255 F.3d 261, 266 (5th Cir. 2001) ("'[D]isqualification cases are governed by state and national ethical standards adopted by the court' [including the] Model Rules of Professional Conduct (quoting FDIC v. U.S. Fire Ins. Co., 50 F.3d 1304 (5th Cir. 1995))), In re Reines, 771 F.3d 1326, 1330 (Fed. Cir. 2014) (concluding that the ABA Model Rules should be used to evaluate an ethical issue instead of the rules of a specific state), In re Girardi, 611 F.3d 1027, 1035 (9th Cir. 2010) (identifying case law, applicable court rules, state rules of professional conduct, and the Model Rules as sources to determine if an attorney's conduct violates ethical norms).
[21] MODEL RULES OF PRO. CONDUCT r. 1.7(a) (AM. BAR ASS'N 1983).
[22] MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS'N 1983).

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another client," and conflicts where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities. . . ."[23]

The prohibition against directly adverse representation means simply that a lawyer may not "act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated."[24] The drafters of the rule were concerned that clients could feel "betrayed" which would cause irreparable harm to the lawyer-client relationship.[25] The rule is also designed to protect against lawyers choosing not to pursue one client's case, or pursuing it less effectively, in order to protect a different client.[26]

The prohibition against directly adverse representation can apply even when one client is not named in the suit. For example, in *Celgard LLC v. LG Chem, Ltd.*,[27] the Federal Circuit disqualified Jones Day from representing Celgard.[28] Jones Day represented Apple on other matters, because LG Chem sold batteries to Apple, Jones Day could not represent Celgard for purposes of getting an injunction preventing LG Chem from selling batteries.[29] Using North Carolina Rule of Professional Conduct 1.7(a)(1)—which is identical to Model Rule 1.7(a)(1),[30] the court reasoned Jones day should be disqualified because "any '[a]dvocacy by counsel for [plaintiff in support of]. . . the injunction will adversely affect [customer]'s interest in being free of the bar of the injunction.'"[31] The court was also concerned because "Apple face[d]. . . the

[23] MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 1983).
[24] MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 6 (AM. BAR ASS'N 1983).
[25] *Id.*
[26] *Id.*
[27] 594 F.App'x. 669 (Fed. Cir. 2014).
[28] *Id.* at 671.
[29] *Id.*
[30] AM. BAR ASS'N, Variations of the ABA Model Rules of Professional Conduct: Rule 1.7 Conflict of Interest: Current Clients, ABA (Oct. 28, 2021) https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-7.pdf.
[31] *Celgard*, 594 F.App'x at 671.

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possibility of finding a new battery supplier, [and] additional targeting by Celgard in an attempt to use the injunction issue as leverage in negotiating a business relationship."[32]

Model Rule 1.7(a)(2) prohibits conflicts where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities. . . ."[33] The drafters make it clear in the comments to rule 1.7 that "the mere possibility of subsequent harm does not [create a conflict]. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of cation that reasonably should be pursued on behalf of the client."[34] An attorney can have a conflict of interest under Model Rule 1.7(a)(2) when representing multiple parties in transactional work,[35] or when an attorney represents multiple plaintiffs in the same litigation who have different interests.[36]

Model Rule 1.10 imputes conflicts of interest under Rule 1.7 to other lawyers in the firm. "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . . ."[37] Rule 1.10 has exceptions for conflicts based on personal interests of the lawyer and conflicts based on the work a lawyer did while employed at a different firm.[38]

[32] *Id.*
[33] MODEL RULES PRO. CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 1983).
[34] MODEL RULES PRO. CONDUCT r. 1.7 cmt 8 (AM. BAR ASS'N 1983).
[35] *See Id.*
[36] *See* Johnson v. Clark Gin Serv., Inc., no. 15-3290, 2016 WL 7017267, at *9 (E.D. La. Dec. 1, 2016) (granting a motion to "determine conflict-free representation" when the attorney represented both a passenger of Amtrak and the engineer driving the train to sue Amtrak).
[37] MODEL RULES PRO. CONDUCT r. 1.10(a) (AM. BAR ASS'N 1983).
[38] MODEL RULES PRO. CONDUCT r. 1.10 (AM. BAR ASS'N 1983).

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Analysis of Rule 1.10 largely turns on if a lawyer is "associated in a firm."[39] The Model Rules helpfully provide a definition for firm to aid in making this decision. "'Firm' or 'law firm' denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization."[40] Whether lawyers are part of a firm under this definition is a fact specific analysis.[41]

According to the drafters of the Model Rules, imputed conflicts ensures the principle of loyalty underlying conflicts of interest doctrine is upheld.[42] Drafters present two analytical theories for why loyalty must extend to the entire firm: 1) "that a firm of lawyers is essentially one lawyer for the purposes of the rules governing loyalty to the client," or 2) "that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated."[43]

According to the ABA, imputing conflicts is also vital in protecting client confidential information. Model rule 1.10 has an exception for conflicts based on personal interests of the lawyer precisely because no client confidential information is at risk.[44] The drafters say Rule 1.10 "does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented,"[45] but because Rule 1.10 functions methodically to impute all conflicts not based on personal interests and not waived across the entire firm,

[39] MODEL RULES PRO. CONDUCT r. 1.10 (AM. BAR ASS'N 1983).
[40] MODEL RULES PRO. CONDUCT r. 1.0(c) (AM. BAR ASS'N 1983).
[41] MODEL RULES PRO. CONDUCT r. 1.10 cmt. 1 (AM. BAR ASS'N 1983).
[42] MODEL RULES PRO. CONDUCT r. 1.10 cmt. 2 (AM BAR ASS'N 1983).
[43] *Id.*
[44] MODEL RULES PRO. CONDUCT r. 1.10 cmt. 3 (AM BAR ASS'N 1983).
[45] *Id.*

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conflicts are still imputed when there are limited or no impacts on client loyalty or protection of confidential information.[46]

In straightforward cases, courts sometimes entirely skip the step of applying Rule 1.10. For example, in *Celgard*, the court applied Rule 1.7 to Jones Day as an entity instead of a single lawyer or group of lawyers.[47] After concluding that Celgard was directly adverse to Apple, the court concluded that Jones Day could not represent Celgard. The court glossed over the analysis under Rule 1.10,[48] but presumably the court considered Jones Day to be a firm so the conflict of interest for the lawyers who worked on the Apple matters applied to the entire firm. This kind of analysis works perfectly fine when it is clear that an organization is a firm but becomes more difficult when that is in question.

III. International Mega Firms and Imputed Conflicts a Series of Case Studies

When the Rules are applied to organizations with complicated corporate structures, courts can reach absurd outcomes. This Part recounts a short history of how legal practice has changed since the adoption of the Model Rules and then presents a series of case studies about how the Model Rules apply to law firms organized in a complicated structure known as a Swiss verein.

A. A Short History of the Growth of International Mega firms

In the approximately forty years since the Model Rules were published, the structure and size of law firms has changed drastically. Historically, law practice was dominated by solo practitioners offering a limited number of services.[49] When partnerships did form, it was

[46] *See infra,* Part III.
[47] *Celgard*, 594 F.App'x at 672.
[48] *See Celgard*, 594 F.App'x at 672.
[49] Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets*, 60 STAN L. REV. 1689, 1710 n.88 (2008) ("There are no systematic data on firm size in the early parts of the twentieth century but it is clear that the vast majority of lawyers worked in solo practice or at most two-person partnerships."); *See also*, Randall S. Thomas, Stewart J. Schwab, & Robert G. Hansen, *Megafirms*, 80 N.C. L. REV. 115, 133 (2001), Robertson, *supra* note 11, at 72.

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important for all of the lawyers to know and trust each other because they were potentially liable for the actions of any of the partners.[50] Lawyers practicing in small partnership also knew the clients of their partners well.[51] Beginning in the early 1900s larger law firms began to develop, but "even as late as the 1960s, the average size of the largest law firms was forty."[52] Firms have continued to grow since then, and many have more than 1000 lawyers spread across the globe.[53] Law firms market their size and global presence to potential clients and potential employees.[54]

Some of the largest firms have decided to use a structure known as a Swiss verein. The Swiss verein structure became popular for accounting firms before spreading to law firms.[55] In a Swiss verein, separate partnerships in different countries are affiliated under a global organization without losing their independence.[56] Most Swiss vereins are organized into individual entities based on geography and national borders.[57] So a brand will have a global entity and individual organizations in different countries. The brand will have a governing board of directors.[58] At some vereins, the board of directors tightly controls the direction and branding of the smaller entities, but at others the smaller entities are given much more flexibility.[59]

The Swiss verein presents a variety of benefits for a firm. First, the structure makes regulatory compliance much easier because the individual organizations are only required to

[50] Robertson, *supra* note 11, at 73.
[51] *Id.*
[52] Hadfield, *supra* note 49, 1710 n.88 (2008) (citing MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 22 (1993)); *See also,* Thomas et. al., *supra* note 49, at 133 (discussing the economic factors contributing to the growth of large firms).
[53] *See* Hadfield, *supra* note 49, at 1710 n.88 ("Today the average size of the largest law firms is well over 1000 (calculation by author)"); *See also,* Thomas et. al., *supra* note 49, at 133.
[54] *See generally,* Jones Day, *Careers: Limitless Opportunity*, https://www.jonesday.com/en/careers (last visited Jan. 27, 2023) (advertising more than 2,400 lawyers at 42 global offices), Dentons, https://www.dentons.com/en/ (last visited Jan. 27, 2023) (using the tagline "the world's largest law firm").
[55] Megan E. Vetula, *From the Big Four to Big Law: The Swiss Verein and the Global Law Firm*, 22 GEO. J. LEGAL ETHICS 1177, 1181 (2009).
[56] Robertson, *supra* note 11, at 67.
[57] *Id.* at 69.
[58] *Id.* at 68.
[59] *See Id.* at 70.

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comply with the regulations of one nation.[60] It also makes financial sense because there is no profit sharing between individual organizations.[61] Profits are made and distributed within a single region allowing companies to pay competitive wages in different markets.[62] Even though the verein model doesn't allow for global profit sharing, the smaller entities are tied together financially. To accomplish the financial links, the entities engage in cost sharing for expenses like branding and marketing.[63]

The structure allows for lots of lawyers to work in lots of places without overwhelming regulatory hurdles.[64] The regulatory benefits of a Swiss verein structure are being challenged in court, but even if more regulatory burdens are imposed, the structure may remain popular for financial reasons.[65] The sheer size of these firms creates problems with the implementation of the Model Rules. This Note discusses three primary case studies for how the Model Rules about conflicts of interest function, or more accurately fail to function, when applying conflicts of interest and imputation to large law firms structured as Swiss vereins.

B. Cases involving Conflicts of Interest in Swiss Vereins

1. DLA Piper

[60] *Id.* at 69.
[61] *Id.* at 68 (2018).
[62] *See Id. See also,* Dentons, *The World's Largest Law Firm Votes to Combine with Zaanouni in Tunisia* (June 16, 2022) https://www.dentons.com/en/about-dentons/news-events-and-awards/news/2022/june/the-worlds-largest-law-firm-votes-to-combine-with-zaanouni-in-tunisia (announcing a combination between Dentons and Zaanouni that likely wouldn't be financially competitive in an organization with global profit sharing).
[63] Robertson, *supra* note 11, at 69.
[64] *See e.g.*, Dentons, *Careers*, https://www.dentons.com/en/careers (last visited Jan. 27, 2023) (advertising over 12,000 lawyers globally), Hogan Lovells, *Join Us*, https://www.hoganlovells.com/en/global-careers (last visited Jan. 27, 2023) (advertising over 2,600 lawyers in 22 countries worldwide), Norton Rose Fulbright, *Global Coverage*, https://www.nortonrosefulbright.com/en-gb/global-coverage (last visited Jan. 27, 2023) (advertising over 3,500 lawyers globally) Backer McKenzie, *About Us*, https://www.bakermckenzie.com/en/aboutus (last visited Jan 27. 2023) (advertising 6,500 lawyers at 70 global offices), DLA Piper, *Find A Lawyer* https://www.dlapiper.com/en-us/people#t=All&sort=relevancy (last visited Jan. 27, 2023) (listing over 5,500 lawyers).
[65] Sam Skolnik, *Big Law Operating Model Threatened in Baker McKenzie Mine Case*, BLOOMBERG LAW (Feb. 13, 2023, 5:30 AM), https://news.bloomberglaw.com/business-and-practice/big-law-operating-model-threatened-in-baker-mckenzie-mine-case.

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In the first recorded opinion addressing how conflicts of interest are applied to Swiss Vereins,[66] a bankruptcy court prevented DLA Piper US from representing Project Orange Associates, LLC ("Project Orange") as bankruptcy counsel because DLA Piper International worked on matters for General Electric ("GE"), Project Orange's largest unsecured creditor.[67] The case was primarily analyzed under bankruptcy law, but the court was particularly concerned that DLA Piper admitted that it could have a conflict and then pretended that conflict did not exist because GE and Project Orange had already agreed to stipulations so the two parties were no longer directly adverse.[68]

The court relegated all discussion of if DLA Piper US and DLA Piper International should be considered one firm to a footnote.[69] The court decided that because DLA Piper US and DLA Piper International hold themselves out to the world as one firm through online marketing and branding, the two entities should be evaluated as a single firm.[70] The court was particularly concerned that when taken "to its logical conclusion, this would lead to the anomalous result that DLA Piper, on behalf of one client, could be adverse to DLA Piper International, on behalf of one of its clients, without violating ethical standards."[71] The court's cursory look at how Swiss vereins operate dismisses the different dangers to the actual concerns ethical rules guard against—commitment to client confidentiality and loyalty—in favor of rigidly applying rules designed for small law firms.

2. Norton Rose Fulbright

[66] Robertson, *supra* note 11, at 77.
[67] *In re* Project Orange Assocs., LLC, 431 B.R. 363, 365-366 (Bkrtcy. S.D.N.Y. 2010).
[68] *Id.* at 379.
[69] *See Id.* at 371 n.3.
[70] *Id.*
[71] *Id.*

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The question of imputing conflicts across the verein structure has come up on at least two occasions since Norton Rose combined with Fulbright & Jaworski. In the first such question, Fulbright & Jaworski had represented Duke university in litigation opposing John-Wayne branded whiskey attempting to trademark "Duke."[72] When Fulbright & Jaworski merged with Norton Rose, a conflict developed because the Canadian arm of Norton Rose had worked for the distillery marketing John-Wayne whiskey.[73] A motion to disqualify was never considered because the court dismissed the case on jurisdictional grounds.[74]

More recently, in *Gartner, Inc. v. HCC Specialty Underwriters, Inc.*,[75] the court dismissed a motion to disqualify Norton Rose Fulbright US ("NRFUS") from working on a matter for HCC Specialty Underwriters ("HCC"), a parent company to U.S. Specialty Insurance Company ("USSIC").[76] Norton Rose Fulbright Australia ("NRFA") worked on a matter for Gartner Australasia, a subsidiary of Gartner, Inc. ("Gartner").[77] USSIC, represented by NRFUS, sued Gartner "seeking a declaration that it was not required to pay Gartner for COVID-19 related [event] cancelations."[78] Gartner moved to disqualify NRFUS.[79]

The court declined to disqualify NRFUS. Notably, NRFUS did not argue that it was a separate firm from NRFA.[80] Instead they argued that even if this was a concurrent conflict of interest, disqualification was not appropriate.[81] The court agreed. First the court concluded that a concurrent conflict of interest did exist.[82] The court then concluded that there was a low

[72] Robertson, *supra* note 11, at 78.
[73] *Id.*
[74] *Id.*
[75] 580 F.Supp.3d 31 (S.D.N.Y. 2022).
[76] *Id.* at 33.
[77] *Id.*
[78] *Id.* at 34-35.
[79] *Id.* at 33.
[80] *Id.* at 40.
[81] *See Id.* at 39-41.
[82] *Id.* at 39.

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likelihood of client confidential information being shared because of the structure of Norton Rose Fulbright and that any information that was shared would not be relevant to the issues in the dispute with USSIC, namely the scope of insurance coverage.[83] The court noted that Norton Rose Fulbright's "massive size" and the "'de facto separation'" between international arms of the verein made "inadvertent disclosures unlikely."[84] Finally, the court held that disqualification would not be proper because the risk to Gartner was low and disqualification would seriously prejudice USSIC.[85]

3. Dentons

The most detailed case applying ethical conflict of interest doctrine to a law firm structured as a Swiss verein comes out of litigation involving Dentons. The root of the conflict of interest occurred when, Dentons US agreed to represent RevoLaze in a case involving international trade a patent law.

RevoLaze is an Ohio engineering company that holds various patents including a patent on methods of "laser abrading" denim.[86] After denim manufacturers moved operations overseas and committed to ending the use of sandblasting,[87] RevoLaze suspected that denim manufacturers abroad were infringing on the patent for "laser abrading."[88]

To protect the patent and income from the patent, RevoLaze decided to file suits in the ITC and in federal district court.[89] RevoLaze hired Dentons US for this work. Dentons US is one

[83] *Id.* at 39-40.
[84] *Id.* at 40.
[85] *Id.* at 41 (S.D.N.Y. 2022).
[86] *Id.* at 479.
[87] *See* Cordelia Hebblethwaite & Anbarasan Ethirajan, *Sandblasted jeans: Should we give up distressed denim?*, BBC (Oct. 1, 2011), https://www.bbc.com/news/magazine-15017790. for a discussion on the health problems associated with sandblasting denim, including lung disease, silicosis, and death.
[88] *Revolaze*, 191 N.E.3d at 479.
[89] *Id.* at 479-480.

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"arm" of a larger Swiss verein.[90] The Dentons Swiss verein was created in 2015 to enable Dentons to merge with Dacheng, a Chinese based law firm, and still comply with Chinese laws about representation by international firms.[91]

To enable the litigation, Revolaze acquired a complicated third party funding agreement. In the agreement, Longford Capital (Longford) promised to provide up to $8 million for litigation and Dentons US agreed to cap their billing. Revolaze would only have to reimburse Longford if the litigation was successful.

In the ITC, RevoLaze named manufacturers it accused of infringing on the patent and sought a general exclusion order (GEO).[92] A GEO enables a company "to block importation [of goods made using patented processes] by companies identified as importing infringing products, regardless of whether the [company] was named as a respondent in the ITC litigation."[93] Revolaze sought monetary damages from infringing companies in federal district court because the ITC cannot award damages.[94]

On August 15, 2015, Dentons US filed 17 lawsuits in the United States District Court for the Northern District of Ohio, Eastern Division, seeking damages based on patent infringement. Three days later, on August 18, 2015, Dentons US filed a complaint in the ITC under section 337 of the Tariff Act of 1930 against the same 17 respondents.[95]

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[90] Robertson, *supra* note 11, 78.
[91] Reuters Staff, *Dentons, Dacheng merge to create world's biggest law firm*, Reuters (Jan. 27, 2015, 7:50 AM), https://www.reuters.com/article/us-china-law/dentons-dacheng-merge-to-create-worlds-biggest-law-firm-idUSKBN0L01FI20150127.
[92] *Revolaze*, 191 N.E.3d at 479.
[93] *Id.* at 479-480.
[94] *Id.* at 480.
[95] Press release from USITC dated September 17, 2014, New Release # 14-094, https://www.usitc.gov/press_room/news_release/2014/er0917mm1.htm. The respondents were Abercrombie & Fitch Co., American Eagle Outfitters, Inc., BBC Apparel Group, LLC, Gotham Licensing Group, LLC, The Buckle, Inc., Buffalo International ULC, 1724982 Alberta ULC, Diesel S.p.A., DL1961 Premium Denim Inc., Eddie Bauer LLC, The Gap, Inc., Guess, Inc., H&M Hennes & Mauritz AB, H&M Hennes & Mauritz LP, Roberto Cavalli S.p.A., Koos Manufacturing, Inc., Levi Strauss & Co., Lucky Brand Dungarees, Inc., Fashion Box S.p.A., and VF Corporation.

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The Gap (Gap), a respondent in the ITC filed a motion to disqualify Dentons US as counsel.[96] Gap alleged that Dentons US is a "portal" of the larger Dentons Swiss verein (Dentons Global) which represents Gap on matters around the world.[97] Gap alleged that the relationship with Dentons Global makes an ethics conflict despite not having a conflict directly with Dentons US. Furthermore, Gap alleged that, because of the relationship with Dentons Global, Dentons US has "ongoing and unfettered access to Gap's confidential and privileged information relevant to the claims and defenses" in the ITC case.[98] Gap noted that the information provided to Dentons Canada for work pertaining to a Canadian border Services Agency customs audit includes, "U.S. importation, exportation, financial, and taxation structure, records, and information."[99] Gap was not informed of the conflict, and therefore did not consent to the representation.[100]

Dentons US did not file a response to Gap's motion to disqualify, but they alleged in a later motion that due to the Swiss verein structure Dentons US and Dentons Canada are separate entities. Dentons US specifically noted the legal practices of Dentons US and Dentons Canada: "[1] do not have access to each other's files; [2] do not share client confidential information unless acting 'as co-counsel'; [3] do not share profits and losses; and [4] are financially and operationally separate."[101] Dentons US said that the separate legal practices of each country wide Dentons practice create an ethical screen.[102] Dentons US also noted that all Dentons US attorneys and paralegals who worked on the matter had not "accessed an files, or received any documents or information from any lawyer, at Dentons Canada LLP or Dentons Europe LLP

[96] In re *Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, Order No. 43, 2015 ITC Lexis 359 (May 7, 2015).
[97] *Id.*
[98] *Id.* at *1.
[99] *Id.* at *1.
[100] *Id.* at *2.
[101] *Id.* at *4.
[102] *Id.* at *5.

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relating to Gap."[103] Finally Dentons US alleged that Gap had signed a retainer agreement with Dentons Canada that contained a provision waiving potential future conflicts, and that Gap only attempted to disqualify Dentons US after deciding they could not refute the complaint.[104]

The ITC relied on The Model Rules of Professional Conduct to decide the motion to disqualify because the model rules "reflect a national consensus."[105] The ITC specifically used Model Rule 1.7 and Model Rule 1.10 in deciding if Dentons US should be disqualified. The ITC recognized, "a violation of the ethical rules does not result in per se disqualification of the attorney involved."[106] Instead, the ITC employed a balancing test to weigh the prejudice to another party in the case with the prejudice to the party whose lawyer would be disqualified.[107] The court looked to five factors in the balancing test: "[1] the nature of the ethical violation, [2] the prejudice to the parties, [3] the effectiveness of counsel in light of the violation, [4] the public's perception of the profession, and [5] whether a disqualification motion was used as a means of harassment."

Using the Model Rules and the balancing test, the ITC granted Gap's motion to disqualify Dentons.[108] First, the ITC decided that Dentons Global qualified as a single law firm subject to Model Rule 1.10 because "Dentons holds itself out to the public as a single law firm" and is "an association authorized to practice law" under the definition of law firm in Model Rule 1.0.[109] Because Dentons Canada represented Gap and Dentons US represented RevoLaze, a conflict of interest existed under Model Rule 1.7 and was imputed under Model Rule 1.10.[110]

[103] *Id.* at *5.
[104] *Id.* at *6.
[105] *Id.* at *10.
[106] In re *Certain Laser Abraded Denim Garments*, 2015 ITC Lexis 359, at *13.
[107] *Id.*
[108] *Id.*at *23.
[109] *Id.* at *17.
[110] *Id.* at *18-19.

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"Dentons US is therefore banned . . . from helping Complainants bring claims against Gap in this Investigation."[111] The ITC notes that Dentons could have obtained informed consent for both parties to waive the conflict, but refused to do so even though the firm had identified the potential conflict of interest.[112] Finally, the ITC decided that the conflict had "tainted" the proceedings because Dentons owed a duty of loyalty to Gap and "disregarded" the Rules of Professional Ethics by recognizing a conflict and not clearing it.[113] The prejudice to RevoLaze did not outweigh the factors favoring disqualification, especially because RevoLaze had been informed of the conflict and "nevertheless proceeded against Gap as a named Respondent."[114] The ITC also said that allowing Dentons to represent RevoLaze would "impact negatively on the law profession as a whole" because Dentons Global "holds itself out to the public as a unified global law firm in order to attract business."[115]

After Dentons was disqualified from the ITC proceedings, RevoLaze sought new counsel, but could not come to an agreement to cap billing like they had with Dentons.[116] RevoLaze then filed a malpractice suit against Dentons and was awarded 32 million dollars at a jury trial.[117] On April 28, 2022, the Court of Appeals for the Eighth Appellate District of Ohio affirmed the malpractice judgement against Dentons US.[118] On August 30, 2022, the Ohio Supreme Court declined to hear the discretionary appeal and the judgement became final.[119]

In sum, Dentons US had to pay 32 million dollars for representing a small Ohio company against a multinational corporation because the multinational corporation had previously used

[111] *Id.* at *19.
[112] *Id.*
[113] *Id.* at *20.
[114] *Id.* at *22.
[115] *Id.* at *22.
[116] RevoLaze LLC v. Dentons US LLP, 191 N.E.3d 475, 482 (Ohio 2022).
[117] *Id.* at 483-484.
[118] RevoLaze LLC v. Dentons US LLP, 191 N.E.3d 475 (Ohio 2022).
[119] *Id.* at 577.

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Dentons Canada, even though Dentons US had no access to files or other confidential information held by Dentons Canada and had not sought access to any such information.

IV. Moving Towards a Workable Solution

As the case studies show, applying the Model Rules to global megafirms creates unintended outcomes. However, scholars have also criticized the Model Rules on concurrent conflicts of interest for a variety of other reasons. This part explores criticisms to the Model Rules on concurrent conflicts of interest and imputation and provides a workable solution that allows courts more flexibility to respond to the varieties in modern legal practice.

A. Failures of the Current System

Almost from their inception, the Model Rules about conflicts of interest have been criticized for their complexity.[120] Scholars have used such colorful language as, "arcane, a subspecialty whose interpretation can seem as abstruse as explicating the Dead Sea Scrolls"[121] and "not only pervasive, but intractable."[122] Kevin McMunigal, a legal ethics professor, proposes that a significant portion of the confusion surrounding Rule 1.7 is because the rule fails to identify its underlying approach.[123]

McMunigal suggests that there are three theoretical categories that could underly Rule 1.7—risk avoidance, resulting impairment, and appearance.[124] Under a risk avoidance model, "the boundary between permissible and impermissible conduct is determined by the degree of risk presented."[125] A resulting impairment approach sets the boundary at "the point at which the

[120] Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 823 (1992).
[121] *Id.* (quoting Stephen Gillers, *Conflicts: Risky New Rules*, AM. LAW, Sept. 1989, at 39).
[122] *Id.* (quoting GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.7:101, at 217 (2d ed. Supp. 1991)).
[123] *Id.* at 825.
[124] *Id.*
[125] *Id.*

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attorney's functioning is either actually impaired or certain to be impaired."[126] Finally, the appearance approach sets the boundary "by reference to the appearance of some impropriety."[127] Though the three approaches can be closely linked, McMunigal argues that confusion about which category the rules try to take creates confusion about how the rules work.[128]

Confusion is not the only identified problem with the current conflicts of interest doctrines. Janine Griffiths-Baker and Nancy Moore, leading legal ethics scholars, identify four criticisms of the prohibition against the Model Rules treatment of conflicts of interest: "(1) a significantly increased demand for specialist legal services, (2) the globalization of commerce, (3) a dramatic growth in the size of law firms, and (4) much greater mobility withing the profession."[129]

One of the biggest problems with the current rules, restricting a party's ability to choose a lawyer, is routinely noted by courts that speak about disqualification; any time a disqualification motion is granted, one party has their ability to choose a lawyer restricted.[130]

This problem grows exponentially when one considers how law firms have expanded over the last 40 years. Previously, imputed conflicts would typically impact less than 1000 lawyers practicing in the same firm,[131] but now an imputed conflict at a single firm might affect over 10000 lawyers.[132] This results in the concerning thought experiment that a company could purposefully spread small matters to many large law firms in an effort to disqualify thousands of

[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] Griffiths-Baker & Moore, *supra* note 11, 2543.
[130] *See e.g.,* Gartner Inc., v. HCC Specialty Underwriters, 580 F.Supp.3d 31, 41 (S.D.N.Y. 2022) ("[The defendants] would be prejudiced if they had to restart anew with a new litigation team."), In re *Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, Order No. 43, 2015 ITC Lexis 359 at *21 (May 7, 2015) ("It is important that parties be able to choose and maintain counsel.").
[131] Robertson, *supra* note 11, 83.
[132] Dentons, https://www.dentons.com/en/ (last visited Jan. 27, 2023).

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lawyers.[133] This is especially true because Model Rule 1.7(a)(1) prohibits all "directly adverse" representation regardless of if the representation is in a different practice area.[134]

Furthermore, the way courts decide if lawyers are acting within a firm—the holds themself out as a single law firm standard-- does little to actually show if conflicts of interest will actually impact clients.[135] As we all know, law firms will espouse many things on websites and marketing to attract clients and talent. For example, Dentons highlights a "poly centric and purpose-driven approach ."[136] Though the buzzwords might seem valuable, they actually say very little about how the firm works for its clients. Similarly, marketing says very little about how the firm is structured and what risk conflicts of interest in the firm pose to actual clients. Griffiths-Baker and Moore criticize this approach because, "no account is taken of the likelihood of such information being passed."[137]

The system for dealing with conflicts of interest derived under the Model Rules is not the only way to approach conflicts of interest. In the European Union, preclusive conflicts only arise when a lawyer represents two or more clients whose interests conflict in the same matter, or where there is a breach of confidence or impaired judgement.[138] In the United Kingdom, conflicts of interest do not impute unless the fee earner actually holds confidential information.[139] While these changes may solve some of the problems identified in this Note, smaller changes to the Model Rules could solve those same problems without a complete overhaul of how conflicts of interest are understood in America.

B. Proposed Change to Model Rule 1.7(a)

[133] Robertson, *supra* note 11, 83.
[134] MODEL RULES OF PRO. CONDUCT r. 1.7(a) (AM. BAR ASS'N 1983).
[135] Robertson, *supra* note 11, 81.
[136] Dentons, https://www.dentons.com/en/ (last visited Jan. 27, 2023).
[137] Griffiths-Baker & Moore, *supra* note 11, 2552.
[138] Daniel J. Bussel, *No Conflict*, 25 GEO. J. LEGAL ETHICS 207, 211 (2012).
[139] Griffiths-Baker & Moore, *supra* note 11, 2543.

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This note proposes changing Model Rule 1.7(a) to read, "A Lawyer shall not represent or continue to represent a client if the representation creates a concurrent conflict of interest. A concurrent conflict of interest exists where there is a significant risk that the interests of the lawyer, or law firm, including the duties to a client, former client, or third party of the lawyer, or law firm, will materially and adversely affect the representation of the client, except as permitted in (b)." Changing the Model Rule would give states guidance to similarly adjust their own rules and impact cases, such as those above, where the Model Rules have been used as the starting point for the analysis of disqualification in Federal Court.

This proposed rule has two primary changes. First, it combines Model Rule 1.7 and Model Rule 1.10. Second, the proposed rule combines the two prongs of Model Rule 1.7(a) into a single question of whether the interest or duties to clients will materially and adversely affect the representation of the client. The two changes serve to allow flexibility in the imputation of conflicts that can better serve both small and large firms and focus the inquiry on the impact to a client.

The proposed rule allows for flexibility in the imputation of conflicts. Under the Model Rules, if any lawyer in a firm has a conflict based on the concurrent representation of a client, that conflict is imputed to all lawyers in the firm.[140] This means that the only question asked during imputation is whether the lawyers are part of the same firm. The primary factors for the inquiry into if a firm is the same is if the lawyers are engaged in a "law partnership, professional corporation, sole proprietorship or other association authorized to practice law."[141] This inquiry is basic when the firm clearly operates in one of those categories, but in the context of a more complicated structure, such as a Swiss verein, courts may also look to whether the organization

[140] MODEL CODE OF PRO. CONDUCT r. 1.10 (AM. BAR ASS'N 1983).
[141] MODEL CODE OF PRO. CONDUCT r. 1.0(c) (AM. BAR ASS'N 1983).

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holds itself out to be a single law firm.[142] This oversimplified inquiry fails to take into account how different organization structures present different risks to clients. However, the proposed rule shifts the inquiry away from a simple question of whether the lawyers are members of the same firm, to how the conflict of any member of the law firm impacts the clients. This creates flexibility in the system to examine the qualities of a firm that either increase or decrease risk to a client. These qualities could include information like data sharing practices, profit and cost sharing, physical location of lawyers, number of lawyers, language barriers, the subject matter that the different lawyers are working on, and any other factors that would either increase or decrease risk.

This proposed rule focuses the question of whether a conflict exists on the impact to a client. A primary goal of Model Rule 1.7 was to protect "the loyalty and independent judgement" required for an ethical client lawyer relationship.[143] But, a rule with zero tolerance for concurrent conflicts of interest across an entire firm is not the only way of achieving the loyalty and independent judgement that the Model Rules seek.

The proposed rule creates an objective standard such that conflicts exist when there is "significant risk. . . of. . . materially and adversely affect[ing] the representation of the client." This means that the loyalty and independent judgement are protected in situations where there is actual risk to the client. Concurrent conflicts of interest is always about balancing the risks to one client with the desires of another. An objective standard for evaluating that risk allows firms to balance all clients, including the small clients for whom they work on fewer matters. Simultaneously it protects the original client from activity that would genuinely cause risk of bad

[142] *See,* in re *Certain Laser Abraded Denim Garments,* Inv. No. 337-TA-930, Order No. 43, 2015 ITC Lexis 359 at *13 (May 7, 2015).
[143] MODEL CODE OF PRO. CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS'N 1983).

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representation. The proposed rule also firmly focuses on the risk avoidance theory advanced by Kevin McMunigal.[144] Such a focus would help ease the confusion that underlies conflicts of interest doctrine.[145]

Furthermore, clients themselves have power to choose lawyers based on their relationship with that lawyer. If a client feels that a lawyer betrayed them the client is still free to seek other counsel under the proposed rule. A feeling of betrayal should not be sufficient to prevent lawyers from working with other clients, but the potential for lost revenue will likely still keep many firms from undertaking work that they know would frustrate a current client even if that work did not present enough risk to the client to qualify as a concurrent conflict of interest under the proposed rule.

C. Applying the Proposed Rule

This Section applies the proposed rule to four cases that have already been examined in this Note. First, the proposed rule is applied in Dentons v. Revolaze because that case had the most details about how the Swiss verein structure impacts clients. Then it is applied to the cases involving DLA Piper and Norton Rose Fulbright. Finally, the proposed rule is applied to Jones Day's work with Celgard and Apple.

Using the proposed rule significantly alters the analysis of each of the above cases. Instead of first defining if there is a conflict of interest and then asking if that conflict of interest imputes across the firm, the proposed rule asks if the work of any member of the firm results in significant risk of material limitation to a client. There is no imputation analysis because the work of one lawyer at a firm is analyzed when deciding if it presents a conflict for any other member of the firm.

[144] McMunigal, *supra* note 120, 825.
[145] *Id.*

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1. Applying the Proposed Rule to Dentons v. Revolaze

The proposed rules would alter the analysis of the Dentons case and would likely lead to a different outcome. The proposed rule creates a concurrent conflict of interest if the lawyer or any lawyer in the firm has a conflict that materially and adversely impacts the client. The first step of this analysis is still to decide if Dentons Canada and Dentons US were the same firm. This analysis would likely mirror the analysis in in re Certain Laser Abraded Garments because the proposed rule does not modify the definition of a law firm under Model Rule 1.0.[146] A court would likely still conclude that Dentons Canada an Dentons US are a single firm under Model Rule 1.0 because the two arms of the verein are still "an association authorized to practice law" and still hold themselves "out to the public as a single law firm."[147] Unlike the current rules, however, under the proposed rule the conflict doesn't automatically impute across the entire firm.

Instead, the court would have to decide if the work of a different lawyer at the firm presents a significant risk that representation of one client would materially and adversely affect the representation of another. In in re *Certain Laser Abraded Garments*, Dentons made arguments that the structure of the Swiss verein significantly mitigated the risk to both Gap and Revolaze.[148] These arguments included that separate legal practices, lack of access to files and client confidential information, and lack of profit sharing essentially created an ethical screen that was sufficient to protect the clients.[149] Furthermore, the lawyers and paralegals for Dentons US had not "accessed any files, or received any documents or information from any lawyer, at Dentons

[146] *See* MODEL CODE OF PRO. CONDUCT r. 1.0 (c) (AM. BAR ASS'N 1983); In re *Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, Order No. 43, 2015 ITC Lexis 359 at *17 (May 7, 2015).
[147] *See* In re *Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, Order No. 43, 2015 ITC Lexis 359 at *17 (May 7, 2015).
[148] *Id.* at *4-5 (May 7, 2015).
[149] *Id.*

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Canada LLP or Dentons Europe LLP relating to Gap."[150] The ITC largely ignored these arguments because Model Rule 1.7(a) defines any directly adverse representation as a concurrent conflict of interest that is automatically imputed under Model Rule 1.10 across an entire firm.[151] Dentons arguments about the actual risk take on much more significance under the proposed rule. A structure where information is not shared across the firm significantly reduces the risk to Gap when Dentons US worked on behalf of Revolaze.

2. Applying the Proposed Rule to DLA Piper

The court in in re *Project Orange*, dismissed the claim that DLA Piper International and DLA Piper US are separate firms very quickly because of the concern that DLA Piper US and DLA Piper International could end up on two different sides of the same litigation. This concern rings true because that is an absurd outcome, but it is not an inevitable outcome.

The proposed rule would avoid that outcome without rigidly applying Model Rule 1.7 and 1.10 on all firms that are linked through branding and organizational structure. Under the proposed rule, the proper analysis is if the work presents a material and adverse risk to either client. If two arms of a verein were to represent clients in a directly adverse position on the same litigation, any sharing of information or change in position based on implicit loyalty would present a great danger to the client. Almost any confidential information that is shared in such a scenario would hurt the client whose information was shared because opposing counsel would have direct access to that information. Furthermore, in directly adverse litigation one client wins and one client loses, or in the case of settlement one client sacrifices some things and the other client sacrifices other things. Any concern about the global client base of the firm could have

[150] *Id.* at *5.
[151] *See generally, Id. See also* MODEL CODE OF PRO. CONDUCT r. 1.7 (a) (AM. BAR ASS'N 1983); MODEL CODE OF PRO. CONDUCT r. 1.10 (AM. BAR ASS'N 1983).

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material impacts on a lawyer's quality of work. Because the danger of sharing even small amounts of client data and the impacts of even inadvertent breaks with client loyalty, no amount of risk mitigation would eliminate the material and adverse risk to a client.

3. Applying the Proposed Rule to Norton Rose Fulbright

Applying the proposed rule to Norton Rose Fulbright in *Garnter*, likely would not change the outcome of that case. In fact, the court discussed many of the factors relevant under the proposed rule when it concluded that disqualification would have been improper.[152] The primary difference under the new rule is that instead of concluding there is a concurrent conflict of interest but deciding not to disqualify NRFUS, the court would have evaluated similar factors to decide that no concurrent conflict of interest existed.

Under the proposed rule, the primary question of if a concurrent conflict of interest exists is if there is material and adverse risk to a client. In this case, there is little to no actual risk to Gartner. As the court noted when concluding not to disqualify, the size and structure of Norton Rose Fulbright means inadvertent disclosures are unlikely.[153] Furthermore, any accidental disclosure is unlikely to pose material risk to Gartner because the subject matter of NFRA's work was different than the work NFRUS engaged in for USSIC.[154] Because there is so little risk to Gartner, under the proposed rule there would not even be a conflict in the first place.

4. Applying the Proposed Rule in Celgard v. L.G. Chem

It is much more difficult to analyze how the new rule would apply to the disqualification of Jones Day in Celgard v. L.G. Chem because the court did not analyze any factors about

[152] *See generally Gartner, Inc. v. HCC Specialty Underwriters, Inc.*, 580 F.Supp.3d 31 (S.D.N.Y. 2022).
[153] *See Id.*
[154] *See Id.*

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imputation. However, information about the firm makes it clear that given how the firm is structured, a court would likely reach the same outcome under the proposed rule.

Jones Day, like Dentons, DLA Piper, and Norton Rose Fulbright is an international firm with many lawyers,[155] but important structural differences mean conflicts of interest pose a much greater danger to clients than at firms structured as Swiss vereins. Jones Day operates as "one firm worldwide" and touts "cross practice and cross office client engagement."[156] A commitment to "cross office client engagement" implies less client confidentiality than at an arm of a Swiss Verein with no access to client files from other entities. Furthermore, Jones Day uses a managing partner system that vests significant control over the global organization in a single partner. This centralized control and the existence of profit sharing across the organization mean that negative impacts to a client in one country can be felt globally.

Together the likely access to client confidential information and global reach of negative effects to clients mean that there is a much greater likelihood that a conflict of interest in one location would materially and adversely affect a client in another location. In the case of Celgard v. LG Chem, discussed *infra* Part I, the court would likely still conclude that Jones Day was disqualified from representing Celgard because the impact to Apple as a purchaser from LG Chem would still be material and adverse.

V. Conclusion

The legal profession is increasingly practiced on a global scale.[157] These firms look very different from the smaller and more local firms that the Model Rules envisioned when they were codified in the 1980s. Global megafirms, especially those structured as Swiss vereins, pose

[155] Jones Day, *Firm History*, https://www.jonesday.com/en/firm/history?tab=overview (last visited Jan. 27, 2023) (advertising 2,500 lawyers globally).
[156] *Id.*
[157] *See generally*, Hadfield, *supra* note 49, Thomas et. al., *supra* note 49, Cassandra Burke Robertson, *supra* note 11.

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different risks to clients based on concurrent conflict of interest than smaller local firms. This note proposes a modification to Model Rule 1.7(a) that centers actual risk to clients over mechanical imputation of all conflicts across a firm. Further scholarship in this area could consider how other Model Rules, such as Rule 1.9 Duties to Former Clients or Rule 7.3 Solicitation of Clients, should be revised to better capture the realities of globalized legal practice.

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Journal(s)	**Georgetown Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Energy & Sustainability Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Butler, Paul
pdb42@georgetown.edu
(202) 662-9932
Heinzerling, Lisa
heinzerl@law.georgetown.edu
Colangelo, Sara
sac54@law.georgetown.edu
202-661-6543
Summers, Nicole
nicole.summers@georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MARGARET A. MCCALLISTER

901 H St NE, Apt. 746, Washington, DC 20002 • (415) 819-1207 • mam804@georgetown.edu

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

It is with great interest and enthusiasm that I submit this application for a 2024 clerkship in your chambers. I am a rising third-year law student at Georgetown University Law Center and a member of the *Georgetown Law Journal*.

I am confident that I could contribute meaningfully to your chambers. This past semester, I competed in the *West Virginia University Energy and Sustainability Moot Court Competition* on behalf of Georgetown Law's Appellate Advocacy team. I am proud to share that my team won the overall competition and earned second place for best brief. These accolades represent the countless hours of hard work spent learning the nuances of energy law, practicing techniques of oral argument, and brief writing. Next year, I have been selected to be a Law Fellow (teaching fellow for 1L legal writing) where I will work with first-year students on their legal writing while taking an advanced legal research and composition seminar.

I have attached my resume, writing sample, and law school transcript for your review. Professors Lisa Heinzerling, Paul Butler, Nicole Summers, and Sara Colangelo have submitted letters of recommendation on my behalf.

Thank you for your time and consideration. Please let me know if I can provide you with additional information.

Sincerely,
Margaret McCallister
Candidate for Juris Doctor 2024

MARGARET A. MCCALLISTER

901 H St NE, Apt. 746, Washington, DC 20002 • (415) 819-1207 • mam804@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, D.C.**
Juris Doctor — Expected May 2024
Journal: *Georgetown Law Journal* – Executive Symposium Editor — **GPA:** 3.67
Research Asst: Georgetown Climate Center (Spring 2022); Prof. Kristen Tiscione (2022), Prof. Sara Colangelo (2023)
Honors: WVU Energy & Sustainability Moot Court Competition 2023 Winner and Best Brief Runner Up; Beaudry Moot Court Competition Semifinalist; Merit Scholarship
Activities: Law Fellow (2023-2024); Barristers' Council – *Appellate Advocacy Division*; Environmental Law Society

PRINCETON UNIVERSITY, SCHOOL OF ENGINEERING AND APPLIED SCIENCE — **Princeton, NJ**
Bachelor of Science in Engineering, cum laude, in Civil and Environmental Engineering — June 2019
Honors: Society of Sigma Xi, Civil and Environmental Engineering Book Award
Activities: Mock Trial – *Captain*; Princeton Legal Journal (formerly Princeton Law Review) – *Managing Editor*; Outdoor Action – *Leader Trainer;* Tiger Inn – *President*
Thesis: *The Impact of Wildfire Emissions: Ozone Precursors and their Contribution to Ambient Pollution*
Presented Thesis to NASA Health and Air Quality Applied Sciences Team (HAQAST) in January 2019

EXPERIENCE

PERKINS COIE — **Washington, D.C.**
Summer Associate – Environment, Energy, and Resources Practice — Summer 2023

RISING FOR JUSTICE, HOUSING ADVOCACY AND LITIGATION CLINIC — **Washington, D.C.**
Student Attorney — Spring 2022

- Represented clients in D.C. Superior Court eviction proceedings including initial hearings, *Bell* hearings, mediation, and trial
- Prepared and filed motions including answers, motions to dismiss, reply briefs, applications to stay writs of restitution, and motions to proceed *in forma pauperis*

CLIMATE LEADERSHIP COUNCIL — **Washington, D.C.**
Extern — Fall 2022

- Researched and analyzed international climate policy, focusing on solutions that leverage market forces

CALIFORNIA FIRST DISTRICT COURT OF APPEAL — **San Francisco, CA**
Judicial Intern to the Honorable Alison M. Tucher — Summer 2022

- Prepared bench memoranda and draft judicial opinions after substantive legal research on matters before the court

ENVIRONMENTAL DEFENSE FUND — **New York, NY**
Carbon Pricing Analyst — July 2019 – July 2021

- Worked collaboratively with 16 other expert teams in the Stanford Energy Modeling Forum 36 to assess climate policy in the wake of the Paris Agreement and future emissions trading strategies
- Developed an innovative modeling tool to derive a marginal abatement cost curves (MACCs) for every country separated by sector and gas to facilitate comparisons of counterfactual emissions trading scenarios

MPALA RESEARCH CENTER — **Nanyuki, Kenya**
Research Assistant — Summer 2018

- Monitored the grazing behavior of livestock species in the field for study on husbandry strategies in rangeland vegetation

PUBLICATIONS

- Gökçe Akin-Olçum ... **Margaret McCallister**, et. al, *A Model Intercomparison of the Welfare Effects of Regional Cooperation for Ambitious Climate Mitigation Targets*, CLIM. CHANGE ECON. 2350009 (2022)
- **Margaret McCallister** et. al, *Forest Protection and Permanence of Reduced Emissions*, 5 FRONTIERS IN FORESTS & GLOB. CHANGE 1 (2022)
- **Margaret McCallister**, Rosalinda Medrano, & Janet Wojcicki, *Early Life Obesity Increases the Risk for Asthma in San Francisco Born Latina Girls*, 39 ALLERGY & ASTHMA PROC. 273 (2018)

INTERESTS

- Baking (especially Claire Saffitz recipes), Backpacking, Crosswords, Yoga, Piano

Record of: Margaret A. McCallister
GUID: 828318853

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	91	Civil Procedure Kevin Arlyck	4.00	B+	13.32	
LAWJ	004	11	Constitutional Law I: The Federal System Laura Donohue	3.00	B+	9.99	
LAWJ	005	13	Legal Practice: Writing and Analysis Kristen Tiscione	2.00	IP	0.00	
LAWJ	008	91	Torts Girardeau Spann	4.00	B+	13.32	

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	36.63	3.33
Cumulative	11.00	11.00	36.63	3.33

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	002	12	Contracts Nakita Cuttino	4.00	A-	14.68	
LAWJ	003	12	Criminal Justice Paul Butler	4.00	A	16.00	
LAWJ	005	13	Legal Practice: Writing and Analysis Kristen Tiscione	4.00	A-	14.68	
LAWJ	007	91	Property Michael Gottesman	4.00	B	12.00	
LAWJ	1349	50	Administrative Law Lisa Heinzerling	3.00	A-	11.01	
LAWJ	611	06	World Health Assembly Simulation: Negotiation Regarding Climate Change Impacts on Health Kathryn Gottschalk	1.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	20.00	19.00	68.37	3.60
Annual	31.00	30.00	105.00	3.50
Cumulative	31.00	30.00	105.00	3.50

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	126	05	Criminal Law Paul Butler	3.00	A	12.00	
LAWJ	1491	110	~Seminar Alexander Blanchard	1.00	A	4.00	
LAWJ	1491	112	~Fieldwork 3cr Alexander Blanchard	3.00	P	0.00	
LAWJ	1491	19	Externship I Seminar (J.D. Externship Program) Alexander Blanchard		NG		
LAWJ	165	07	Evidence Gerald Fisher	4.00	A-	14.68	
LAWJ	1793	08	Housing Law & Policy Seminar Nicole Summers	2.00	A	8.00	

In Progress:

----------Continued on Next Column----------

	EHrs	QHrs	QPts	GPA
Current	13.00	10.00	38.68	3.87
Cumulative	44.00	40.00	143.68	3.59

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	146	08	Environmental Law	3.00	A-	11.01	
LAWJ	361	05	Professional Responsibility	2.00	A	8.00	
LAWJ	552	05	Housing Advocacy Litigation Clinic at Rising for Justice, Law Students in Court Division		NG		
LAWJ	552	80	~Seminar	2.00	A	8.00	
LAWJ	552	81	~Casework	3.00	A	12.00	
LAWJ	552	82	~Professionalism	2.00	A	8.00	
LAWJ	610	05	Week One Teaching Fellows (Public Speaking For Lawyers)	1.00	P	0.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	13.00	12.00	47.01	3.92
Annual	26.00	22.00	85.69	3.90
Cumulative	57.00	52.00	190.69	3.67

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 14, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Margaret McCallister as a law clerk. Maggie was a student in two of my courses at Georgetown Law. She received an “A” grade in each course. She engaged deeply with the curriculum and attended office hours often to discuss the nuances of the law, public policy rationales, and general thoughts about class discussion. In Criminal Law I selected Maggie to present on a topic that was both intellectually challenging and sensitive. She performed so well that I sent her an email after encouraging her to consider a career as a litigator.

Maggie is an incisive legal analyst and a first rate communicator. She holds an engineering degree from Princeton, and I suspect the critical thinking and analytical skills she learned there have benefitted her strong legal abilities. She has already published articles in scientific fields. Maggie recently assumed the position of Executive Symposium Editor of the prestigious Georgetown Law Journal. This also speaks to her excellent research and writing skills.

Maggie attended office hours very regularly, so I got to know her better than most students. She is a respectful, kind, and ambitious student with a great sense of humor. She is passionate about environmental justice, and I know she will have an extremely successful career as a lawyer. I think Maggie would be a spectacular law clerk, and a joy to have around chambers. I recommend her with great enthusiasm.

Sincerely,

Paul Butler
Albert Brick Professor in Law

Paul Butler - pdb42@georgetown.edu - (202) 662-9932

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing, with great enthusiasm and anticipation, to recommend Margaret McCallister for a judicial clerkship with you.

I know Maggie well. She took my course in Administrative Law as an elective in her first year of law school, and this past spring she was a student in my course in Environmental Law. In both classes, Maggie distinguished herself with her level of preparation, incisive comments, and intellectual curiosity. Maggie relishes thinking through complicated legal questions and doesn't rest until she, by her own lights, gets them right. In both Administrative Law and Environmental Law, Maggie was in a small study group of four students who regularly appeared at my doorstep, right on the dot, at the appointed time for my office hours. These students were so well prepared, and so eager to get to the bottom of the legal questions we had discussed in class, that, to be honest, I sometimes found myself stumped! When that occurred, we all happily consulted our statutes and cases, emerging with fresh collective understanding. For a teacher, such an experience is delightful.

In both of the courses she took with me, Maggie performed well on the final exams, earning an A- both times out. Her exams were notable, in particular, for their close parsing of statutory language and their effective deployment of relevant judicial decisions. Maggie's impressive research and writing skills are also evident in her successful performances in two moot court competitions and her selection as the symposium editor for our flagship journal, the *Georgetown Law Journal*.

Among law students, Maggie also stands out by virtue of her serene composure; she just never gets rattled. Maggie's self-possession may be, at least in part, a function of her experiences leading backpacking trips during her undergraduate years at Princeton. She participated in Princeton's "Outdoor Action" program before starting her freshman year, and she loved it so much that she went on to become the lead trainer for the students who led the trips – a leader for the leaders, if you will. Outdoor Action's freshman trips plunge incoming students – many of whom have essentially no experience in the outdoors, let alone experience backpacking – into intense six-day backcountry experiences. By her own account, in leading the freshman trips and eventually leading the leaders on training trips, Maggie developed her capacity to communicate with clarity and to lead collaboratively. While backpacking might seem far afield from serving as a law clerk, I am confident that Maggie's experiences in the outdoors give her a special kind of composure that will be invaluable in the high-stakes setting of judicial chambers.

I recommend Maggie McCallister to you without reservation. I hope these comments are helpful to you in considering Maggie's application for a clerkship. Please let me know if I can be of any further assistance.

Sincerely,

Lisa Heinzerling
Justice William J. Brennan, Jr. Professor of Law

Lisa Heinzerling - heinzerl@law.georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is with great enthusiasm that I write this letter of recommendation on behalf of Margaret McCallister. Margaret's intelligence, commitment to public interest legal work, and genuine passion for litigation would make her a very valuable addition to your chambers.

Margaret is a very bright, thoughtful, and insightful law student, who is capable of digesting complex legal issues extremely well. Margaret came highly recommended for a Research Assistant position due to her excellent research and writing skills. I invited Margaret to become my Research Assistant this fall and have been thrilled with her work thus far.

In each assignment I have given Margaret, her research has been thorough and on-point, her legal writing well organized and structured, and her conclusions accurate. She is highly professional, delivering work on time if not early, and always completing a polished product that exceeds my expectations for a 2L student. Margaret's strong performance has also been consistent across all media; both her writing and oral presentation are excellent. Her reputation for high quality, timely, and professional work are well known to Margaret's peers on her law journal as well. From their remarks, I understand her to be well respected by her colleagues and a strong collaborator with them on the journal.

Finally, Margaret's resume of experience evinces her thorough commitment to public service and litigation. Through her rigorous academics and practical experiences, Margaret is very well prepared for a clerkship. She would make an excellent addition to your staff, and I strongly recommend you consider her candidacy.

Please let me know if I can be of further assistance or answer any additional questions.

Sincerely,

/s/ SARA A. COLANGELO

Sara A. Colangelo
Visiting Professor of Law
Director, Environmental Law & Justice Clinic
202.661.6543
Sac54@law.georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter to offer my strongest recommendation for Margaret McCallister's clerkship candidacy. I am an Associate Professor of Law at Georgetown University Law Center, and I had the pleasure of teaching Ms. McCallister during her 2L year in my Housing Law and Policy seminar. She is one of the most thoughtful, intelligent, and hard-working students I have ever taught, and I cannot recommend her highly enough.

Housing Law and Policy is a 20-student elective seminar offered to students in their second and third years at Georgetown Law. Participation in the seminar is on a volunteer-only basis, and students are evaluated primarily based on a final research paper, along with the quality and quantity of their class participation.

Ms. McCallister excelled in every aspect of her work in the seminar. Her final paper, which she chose to write on the issue of homelessness among youth who "age-out" of the foster care system, was among the top two best papers in the class. First and foremost, the quality of her writing is excellent. She writes clearly, persuasively, and with careful attention to detail and word choice. Her research on the topic was also extremely thorough. She used a variety of sources and dug deep into the legal questions at issue. She was also the only student in the class who – on her own initiative – conducted original research by interviewing stakeholders and policymakers. In her final paper she addressed counterarguments, proposed creative reforms grounded in her research findings, and weaved together historical, legal, and political perspectives. Ms. McCallister's outstanding work earned her an "A" grade for the paper and class.

Ms. McCallister's approach to writing the paper also demonstrates her excellent work ethic. Beginning early in the semester, she came to office hours to discuss possible topics and think through ways to narrow her focus once she settled on the topic of youth homelessness. As far as I am aware, she started her research earlier than anyone in the class. She then continued to meet with me regularly to seek out guidance on research strategies, ensure she was taking the paper in the right direction, and talk through her ideas for policy reforms. Throughout our multiple conversations, I witnessed not only her highly disciplined nature, but also her ability to immerse herself in research and her deep intellectual curiosity.

I offer students the option of submitting a first draft for feedback prior to submitting the final draft of their paper. Ms. McCallister was one of only two students who took advantage of this option, again demonstrating her extraordinary discipline and excellent work ethic. She was very receptive to the feedback I provided and incorporated it meticulously. She also met with me again in office hours to ensure that she understood my comments. This experience highlighted for me many qualities of Ms. McCallister that would make her an excellent law clerk: she works ahead of schedule, seeks out feedback, and incorporates it well. I was so impressed with Ms. McCallister's research and writing skills as well as her work ethic that I offered her the opportunity to work as my research assistant after the semester ended. Unsurprisingly (but disappointing to me), she had already been hired by another professor who was similarly impressed by her work.

Ms. McCallister also came to every class extremely well-prepared. On dimensions of both quality and quantity, her participation was at the very top of the class. Her comments were thoughtful, nuanced, and reflected careful reading of the assigned material. She also often connected themes across multiple discrete course topics and classes, demonstrating deep understanding of the material. She was the student whose hand I was always delighted to see raised – she posed insightful questions that pulled the class conversation in novel and exciting directions.

Finally, Ms. McCallister was a true pleasure to have as a student. She is warm, upbeat, and bursting with intellectual energy. She is reflective and continually sought out feedback to improve her work. I have no doubt that she will be a positive presence in chambers and will approach the role with enthusiasm, energy, and a high degree of professionalism.

I recommend Ms. McCallister with the absolute highest level of support and without any reservation. As a former law clerk myself, I think Ms. McCallister displays all the qualities necessary to excel in the role – she is extremely bright, hard-working, and meticulous. If you have any questions or would like to discuss Ms. McCallister's candidacy further, please do not hesitate to contact me at ns1368@georgetown.edu or (847) 644-5808.

Sincerely,

Nicole Summers
Associate Professor of Law

Nicole Summers - nicole.summers@georgetown.edu

MARGARET A. MCCALLISTER

901 H St NE, Apt. 746, Washington, DC 20002 • (415) 819-1207 • mam804@georgetown.edu

The attached writing sample is the case comment I drafted for Georgetown's *Write-On Competition*. For the 2022 *Write-On Competition*, competitors were limited to only select provided materials while writing the case comment. The 2022 competition provided competitors with 216 pages of cases, statutes, and commentary for analysis. Competitors were allotted two weeks to independently complete both the case comment and Bluebooking exam for consideration for admission to a Journal. I am proud to share that the combination of this case comment, my Bluebooking exam, and my personal statements secured me a position on the *Georgetown Law Journal*.

The case comment was limited to 7 pages of text and 3 pages of endnotes. This 10-page writing sample includes the facts of the case, the case holding, a roadmap explaining the structure of the comment, analysis, and a conclusion; nothing was redacted for the purposes of this writing sample.

Strained Reasoning: Why the Tenth Circuit was Wrong to Account for Subjective Intent in *Strain v. Regalado*

I. Introduction

A. Statement of Facts

Thomas Pratt was booked into Tulsa County Jail to await trial on December 11, 2015.[1] The following morning, Pratt informed prison officials that he was experiencing alcohol withdrawal symptoms and requested medication for his detoxification.[2] A nurse from Armor Correctional Health Services performed a drug and alcohol withdrawal assessment during which Pratt stated that he "habitually drank fifteen-to-twenty beers per day for the past decade."[3] Pratt was admitted to the jail's medical unit for a mental health assessment and monitoring.[4]

While under observation on December 13, Pratt was placed "on seizure precautions, which dictated that staff check his vital signs every eight hours" and was prescribed Librium for his symptoms.[5] During an early morning withdrawal assessment on December 14, Nurse Patricia Deane observed deteriorating symptoms in Pratt, including vomiting, panic attacks, disorientation, and severe tremors, but did not take Pratt's vital signs as was mandated by the seizure precautions.[6] After Deane, another nurse attempted to take Pratt's vital signs, but "could not do so because he would not sit still."[7] Pratt was later switched from the Librium prescription to a Valium prescription, the first dose of which he took later that day.[8]

Later that morning, Dr. Curtis McElroy examined Pratt, during which he noticed a pool of blood in Pratt's cell and observed that Pratt was disoriented and had a gash on his forehead.[9] Later that day, a third nurse noted that Pratt "needed assistance with daily living activities."[10] On December 15, Kathy Loehr evaluated Pratt's mental health in her capacity as a licensed professional counselor (LPC) and noted both the "unintentional" cut on his forehead and that Pratt was shaky and struggled to answer her questions.[11] That afternoon when Dr. McElroy returned to assess Pratt

a second time, Dr. McElroy found Pratt "underneath the sink in his cell" and again noted the cut on Pratt's forehead.[12]

Around midnight on December 16, an additional Armor nurse saw Pratt, but failed to check his vital signs because "he would not get up."[13] An hour later, an officer called for aid upon finding Pratt "motionless on his bed."[14] The responding nurse initiated cardiopulmonary resuscitation (CPR) and "called a medical emergency."[15] First responders resuscitated Pratt and rushed him to the hospital.[16] Hospital officials determined that Pratt had gone into cardiac arrest and discharged him with "a seizure disorder and other ailments" leaving him permanently disabled.[17] Pratt's guardian, Faye Strain, filed suit under 42 U.S.C. § 1983 and Oklahoma state law against defendants Nurse Deane, Dr. McElroy, LPC Loehr, and Tulsa County Sheriff Regalado, alleging the defendants were deliberately indifferent to Pratt's serious medical needs.[18] The district court dismissed Strain's federal law claims and declined to exercise supplemental jurisdiction over Strain's state law claims, which Strain appealed.[19]

B. Holding

The Tenth Circuit Court of Appeals affirmed the district court's ruling that the defendants did not act with deliberate indifference in their medical treatment of Pratt.[20] Writing for the court, Judge Carson held that a pretrial detainee's claim for deliberate indifference is governed by both an objective and subjective standard.[21] The court acknowledged and dismissed the Supreme Court's holding in *Kingsley v. Hendrickson*, construing the language of *Kingsley* to apply only to acts of excessive force and not to claims of deliberate indifference to serious medical needs.[22] While the parties conceded that Pratt exhibited an objectively serious medical need,[23] the court held that Strain's allegations of deliberate indifference to a serious medical need were unsupported by sufficient facts.[24]

C. Roadmap

The Tenth Circuit was correct in deciding that the defendants were not deliberately indifferent to Pratt's serious medical needs; however, the court erred in holding that a subjective prong is necessary to the test for deliberate indifference. This comment argues that the Supreme Court provided clear signals that the standard for pretrial detainees' Fourteenth Amendment claims is distinct from that for inmates' Eighth Amendment claims. This comment also argues that the Tenth Circuit ignored its own precedent and Supreme Court precedent in error when applying a subjective prong for deliberate indifference. Lastly, this comment argues that it was unnecessary to consider the subjective component at all because the defendants' actions were not deliberately indifferent even under the lower bar of an objective standard.

II. Analysis

A. *Farmer v. Brennan* implicitly distinguished between Eighth Amendment claims by inmates and Fourteenth Amendment claims by pretrial detainees.

Inmates may sue prison officials for cruel and unusual punishment under the Eighth Amendment, but pretrial detainees look to the Fourteenth Amendment's Due Process Clause for relief.[25] The Court's language in *Farmer v. Brennan* carefully defined "deliberate indifference" as "requiring a showing that the official was subjectively aware of the risk," and deemed this standard to "comport[] best with the text of the [Eighth] Amendment as [the Court's] cases have interpreted it."[26] This subjective prong has been interpreted as a "*mens rea* prong."[27] To satisfy the subjective component, a plaintiff must produce evidence that the defendant "actually (subjectively) kn[ew] that an inmate [faced] a substantial risk of serious harm."[28]

Because the due process rights of a pretrial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner,"[29] after *Farmer*, lower courts indiscriminately applied a subjective deliberate indifference test to both inmates and pretrial detainees in assessing their § 1983 claims against prison officials.[30] The Seventh Circuit called the

distinction between prisoners' claims and pretrial detainees' claims "immaterial since the legal standard for a § 1983 claim is the same."[31] The Eleventh Circuit similarly noted that "the distinction is unimportant… because this Court has said that 'the minimum standard for providing medical care to a pre-trial detainee under the Fourteenth Amendment is the same as the minimum standard required by the Eighth Amendment for a convicted prisoner.'"[32] However, in *Farmer*, Justice Blackmun in concurrence identified the "source of the intent requirement" as "the Eighth Amendment itself."[33] Moreover, Justice Souter's majority opinion in *Farmer* stated that § 1983 claims "merely provide[] a cause of action, 'contain[ing] no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.'"[34] The Court took great care to discuss the subjective prong of the deliberate indifference test only as applied to Eighth Amendment claims. The lower courts' application of the subjective prong to pretrial detainee Fourteenth Amendment claims went beyond the mandate of *Farmer* and failed to acknowledge the fundamental differences between the causes of action, which the Court addressed in *Kingsley v. Hendrickson.*[35]

B. The Tenth Circuit's treatment of *Kingsley* contravenes its own precedent and should be resolved in favor of an objective test.

In *Kingsley*, the Court explained,"[t]he language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'"[36] Though the *Kingsley* Court declined to decide the question of what standard should govern the mistreatment of pretrial detainees,[37] this statement evidences that there is not a unilateral subjective standard for due process claims by pretrial detainees.[38] Circuits are split on the question of whether to apply an objective or subjective standard. The Second, Seventh, and Ninth Circuits favor an objective test for deliberate indifference.[39] While the Fifth, Eighth, and Eleventh Circuits join the Tenth Circuit in requiring subjective intent as part of the deliberate indifference calculus, each of those circuits relegates their discussion of *Kingsley* to a footnote; they each acknowledge that *Kingsley* may apply, but cabin their

holdings to excessive force claims.[40] *Strain* is the first case interpreting *Kingsley* in which the majority affords *Kingsley* a discussion in the text of the opinion and yet holds that a subjective prong is essential to the test for deliberate indifference.

However, in the *Strain* opinion, the Tenth Circuit relies on its precedent that either predates *Kingsley* or declined to address the case altogether.[41] Though the Tenth Circuit had previously applied *Kingsley* in *Colbruno v. Kessler* "against law enforcement officers who *punished* a pretrial detainee,"[42] the court's opinion in *Strain* attempts to distinguish *Colbruno* by differentiating punishment and inadequate medical care.[43] But, the Tenth Circuit concedes that "punishment is a condition of confinement,"[44] and, in *Wilson v. Seiter*, the Supreme Court stated that there was "no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement.'"[45] The Tenth Circuit's distinction is thus illusory. If both punishment and medical care are conditions of confinement, the same standard should be applied to claims alleging a due process violation of either. If the standard for punishment is objective in the Tenth Circuit, so too should the standard for deliberate indifference be objective.

C. The Tenth Circuit's treatment of *Kingsley* is also inconsistent with Supreme Court precedent, which favors an objective standard for pretrial detainees.

The inclusive language of *Kingsley* should be read as applying to all claims by pretrial detainees, not just claims of excessive force. The Tenth Circuit argues that the Supreme Court "has never suggested that we should remove the subjective component for claims addressing inaction."[46] Yet, the *Kingsley* Court held generally with regard to "the challenged governmental action" and not specifically to excessive force.[47] While the Tenth Circuit argues that *stare decisis* precludes using a purely objective standard for deliberate indifference, citing *R.A.V. v. City of St. Paul* and *Agostini v. Felton*, these cases stand only for the proposition that the court may not contravene Supreme Court decisions, and not that the Tenth Circuit is prohibited from interpreting a decision as applicable to cases the Supreme Court has not squarely addressed.[48]

The Tenth Circuit's opinion heavily relies on *Farmer* but ignores the contours of its holding. In *Farmer*, Justice Souter explained that the Court's prior decision in *Wilson v. Seiter* cited cases that applied an objective standard to deliberate indifference claims "for the proposition that the deliberate indifference standard applies to all prison-conditions claims, not to undo its holding that *the Eighth Amendment* has a 'subjective component.'"[49] Further, in *Bell v. Wolfish*, the Court applied an "objective standard to evaluate a variety of prison conditions" and "did not consider the prison officials' subjective beliefs."[50] Respecting the mandate of *stare decisis* requires that circuit courts follow the precedents of *Wilson* and *Bell* and an objective standard be applied to evaluate prison conditions, including medical care.

Further, to advance its argument of requiring subjective intent in assessing deliberate indifference, the court uses siloed dictionary definitions to attribute meaning to the words "deliberate" and "indifference."[51] In doing so, it disregarded the Supreme Court's clear statement that the "decision that Eighth Amendment liability requires consciousness of a risk is thus based on the Constitution and our cases, not merely on a parsing of the phrase 'deliberate indifference.'"[52] The Tenth Circuit's attempts to attribute specific meaning to words the Court has held are ambiguous contravenes the very precedent the Tenth Circuit relies on.[53]

D. It was unnecessary to consider the defendants' subjective intent because, while possibly negligent, the defendants were not deliberately indifferent to Pratt's serious medical need under the lower threshold of an objective standard.

Even under an objective standard, the defendants cannot be held deliberately indifferent to Pratt's medical needs. Whether the defendants were deliberately indifferent depends on whether they acted in an objectively reasonable manner.[54] Deliberate indifference is found "between the poles of negligence at one end and purpose or knowledge at the other,"[55] but "mere negligence" does not give rise to a claim of deliberate indifference.[56] As in *Swain v. Junior*, both parties acknowledged a serious medical need existed, but disagreed on "the adequacy of the jail's response,"

which is "where the substance of the court's decision ultimately lies."[57] Here, the substance of the court's decision in *Strain* can be determined without reaching a subjective test.

While the staff at Tulsa County Jail may have provided ineffective treatment to Pratt and underestimated the nature of his medical needs, they did provide him with medical care.[58] Upon discovering Pratt in medical distress, he was *rushed* to the hospital.[59] There was no undue delay in his care once the extent of his condition was realized. According to the Eleventh Circuit, which continues to apply a subjective standard post-*Kingsley*, while a "failure to diagnose can be deemed extremely negligent, it does not cross the line to deliberate indifference."[60] Moreover, the Seventh Circuit, which follows the objective test post-*Kingsley*, has held that a prison official was not deliberately indifferent in "failing to monitor a detainee's vitals for signs of *delirium tremens*."[61] Even the Tenth Circuit itself has held that the "negligent failure to provide adequate medical care, even one constituting medical malpractice, does not give rise to a constitutional violation."[62] At most, the defendants are guilty of failing to take Pratt's vitals in violation of protocol and failing to recognize signs of *delirium tremens*.[63] Regardless of whether an objective or subjective standard is applied, these alleged actions are merely negligent and are not deliberately indifferent under an objective or subjective standard.

III. Conclusion

While the Tenth Circuit correctly found that the defendants in *Strain v. Regalado* were not deliberately indifferent, it was incorrect to apply a subjective intent standard in assessing deliberate indifference to a serious medical need. In the wake of *Kingsley v. Hendrickson*, the appropriate test for deliberate indifference to serious medical needs is objective.

[1] *See* Strain v. Regalado, 977 F.3d 984, 987 (10th Cir. 2020).

[2] *See id.*

[3] *Id.* at 987.

[4] *See id.*

[5] *Id.* at 987–88.

[6] *Id.* at 988.

[7] *See id.* at 997 n.3.

[8] *See id.* at 988.

[9] *See id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *See id.*

[14] *Id.*

[15] *Id.*

[16] *See id.*

[17] *Id.*

[18] *Id.* ("Plaintiff alleged that Mr. Pratt's symptoms showed he was suffering from *delirium tremens*.")

[19] *Id.*

[20] *See id.* at 987.

[21] *See id.* at 989 (citing Clark v. Colbert, 895 F.3d 1258, 1267 (10th Cir. 2018)).

[22] *See id.* at 990–91.

[23] *See id.* at 997 n.7.

[24] *See id.* at 997.

[25] *See* Castro v. Cnty. of L.A., 833 F.3d 1060, 1067–68 (9th Cir. 2016) (citing Bell v. Wolfish, 441 U.S. 520, 535 (1979)); *see also* U.S. CONST. art. XIV, § 1, cl. 2.

[26] *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994).

[27] Darnell v. Pineiro, 849 F.3d 17, 29 (2017).

[28] Caldwell v. Warden, FCI Talladega, 748 F.3d 1090, 1099 (2014) (citing Rodriguez v. Sec'y for Dep't of Corr., 508 F.3d 611, 617 (11th Cir. 2007)).

[29] *See* 833 F.3d at 1067 (citing City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983)).

[30] *See id.* at 1068.

[31] *See* Whiting v. Marathon Cnty. Sheriff's Dep't, 382 F.3d 700, 703 (7th Cir. 2004).

[32] *See* Burnette v. Taylor, 533 F.3d 1325, 1333 n.4 (11th Cir. 2008) (citing Lancaster v. Monroe Cnty., 116 F.3d 1419, 1425 n.6 (11th Cir.1997)).

[33] *See* Farmer v. Brennan, 511 U.S. 825, 854 (1994) (citing Wilson v. Seiter, 501 U.S. 294, 300 (1991)).

[34] *See id.* (quoting Daniels v. Williams, 474 U.S. 327, 330 (1986)).

[35] *See* Kingsley v. Hendrickson, 576 U.S. 389 (2015).

[36] *See id.* at 400–401 (citing Ingraham v. Wright, 430 U.S. 651, 671–672 & n.40 (1977)).

[37] *Id.* at 396.

[38] *See* Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415, 424 (5th Cir. 2017) (Graves, J. concurring).

[39] *See* Darnell v. Pineiro, 849 F.3d 17 (2d Cir. 2017); Miranda v. Ctny. of Lake, 900 F.3d 335 (7th Cir. 2018); Castro v. Ctny. of L.A., 833 F.3d 1060 (9th Cir. 2016).

[40] *See Alderson*, 848 F.3d at 419 n.4; Whitney v. City of St. Louis, Mo., 887 F.3d 857, 860 n.4 (8th Cir. 2018); Dang *ex rel.* Dang v. Sheriff, Seminole Ctny., 871 F.3d 1272, 1279 n.2 (11th Cir. 2017); Davies v. Israel, 342 F.Supp.3d 1302, 1310 n.5 (S.D. Fla. 2018).

[41] *See* Strain v. Regalado, 977 F.3d 984, 990–91 (10th Cir. 2020) (citing Clark v. Colbert, 895 F.3d 1258, 1269 (10th Cir. 2018)).

[42] *See id.* at 997 n.6 (citing Colbruno v. Kessler, 928 F.3d 1155, 1163 (10th Cir. 2019)).

[43] *See id.*

[44] *See id.*

[45] *See* Gordon v. Cnty. of Orange, 888 F.3d 1118, 1124 (9th Cir. 2018) (citing Wilson v. Seiter, 501 U.S. 294, 303 (1991)).

[46] *See Strain*, 977 F.3d at 992 (citing Castro v. Cnty. of L.A., 833 F.3d 1060, 1086 (9th Cir. 2016) (Ikuta, J., dissenting)).

[47] *Castro*, 833 F.3d at 1070 (quoting Kingsley v. Hendrickson, 576 U.S. 389, 938 (2015)).

[48] *See Strain*, 977 F.3d at 993 (first citing Agostini v. Felton, 521 U.S. 203, 237 (1997); then citing R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 386 n.5 (1992)).

[49] *See* Farmer v. Brennan, 511 U.S. 825, 839 (1994) (citing *Wilson*, 501 U.S. at 298) (emphasis added).

[50] *See* Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015) (citing Bell v. Wolfish, 441 U.S. 520, 541–543 (1979)).

[51] *See Strain*, 977 F.3d at 992.

[52] *See Kingsley*, 576 U.S. at 826.

[53] *See id.* at 840.

[54] *See* Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015) ("[O]bjective reasonableness turns on the 'facts and circumstances of each particular case.'" (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).

[55] Strain v. Regalado, 977 F.3d 984, 992–93 (10th Cir. 2020) (citing *Farmer*, 511 U.S. at 835).

[56] *Farmer*, 511 U.S. at 835 (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

[57] *See* Recent Case, Swain v. Junior*, 961 F.3D 1276 (11th Cir. 2020),* 134 HARV. L. REV. 2622, 2624–25 (2021).

[58] *Strain*, 977 F.3d at 987.

[59] *Id.*

[60] *See* McElligott v. Foley, 182 F.3d 1248, 1256–57 (11th Cir. 1999).

[61] *See* 977 F.3d at 994 (citing Collins v. Al-Shami, 851 F.3d 727, 731–32 (7th Cir. 2017)).

[62] *Id.* at 994 (citing Perkins v. Kan. Dep't of Corr., 165 F.3d 803, 811 (10th Cir. 1999)).

[63] *See Strain*, 977 F.3d at 988.

Applicant Details

First Name	**Robert**
Last Name	**McCarthy**
Citizenship Status	**U. S. Citizen**
Email Address	**rm6082@nyu.edu**
Address	**Address** Street **36 Locust St** City **Garden City** State/Territory **New York** Zip **11530**
Contact Phone Number	**5165106673**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Legislation and Public Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Sexton, John
john.sexton@nyu.edu
212-992-8040
Sharkey, Catherine
catherine.sharkey@nyu.edu
212-998-6729
Liebman, James S.
jliebman@law.columbia.edu
212-854-3423

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Robert McCarthy
36 Locust Street
Garden City, NY 11530

June 12, 2023

The Honorable Jamar Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a second-year student at New York University School of Law and an Executive Editor for the *Journal of Legislation and Public Policy*. I am writing to apply for a 2024 - 2025 term clerkship in your chambers.

Enclosed are my resume, law school, graduate school, and undergraduate transcripts. Additionally, I have submitted an unedited writing sample. Professors Jim Liebman, John Sexton, and Catherine Sharkey wrote letters of recommendation in my support.

If there is any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Robert McCarthy

ROBERT THOMAS MCCARTHY
36 Locust St., Garden City, New York 11530
(516) 510-6673; rm6082@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, New York
Candidate for J.D., May 2024
Honors: *Journal of Legislation and Public Policy*, Executive Editor
Activities: Student Bar Association, Senator
Law Revue, Actor, Writer, and Producer
Parole Preparation Project, Student Advocate

UNIVERSITY OF NOTRE DAME, Notre Dame, Indiana
M.Ed., May 2020

UNIVERSITY OF VIRGINIA, Charlottesville, Virginia
B.A. in Leadership & Public Policy, Religious Studies, May 2018
Honors: Graduation Speaker, Dean's List
Activities: Batten Undergraduate Council, President

EXPERIENCE

KING & SPALDING LLP, New York, NY
Summer Associate, Summer 2023
Participate in all aspects of complex commercial litigation and international arbitration, including research for a motion in limine and a motion to dismiss. Research includes projects on product liability; contributory infringement of pharmaceutical drugs; and enforcement of arbitral awards under New York Convention. Actively sought out and prioritized pro bono matters.

CENTER FOR PUBLIC RESEARCH AND LEADERSHIP, New York, NY
Graduate Student Associate, Fall 2022
Participated in all aspects of writing a report assessing Delaware's implementation of high-quality instructional materials on students' learning. Facilitated over 20 interviews with educators, conducted 10 teacher observations, researched education law, and wrote and edited final report distributed throughout Delaware.

PROFESSOR CATHERINE SHARKEY, NYU SCHOOL OF LAW, New York, NY
Research Assistant & Teaching Assistant, June 2022 – March 2023
Researched, substantiated, and edited Prof. Sharkey's book review of *Tort Law and the Construction of Change* for *Virginia Law Review*. Collaborated with Prof. Sharkey to revise syllabus and lead seven review sessions.

PROFESSOR CATHERINE SHARKEY, NYU SCHOOL OF LAW, New York, NY
Research Assistant, June 2022 – February 2023
Conducted extensive legal research in civil procedure; updated Wright & Miller's Federal Practice and Procedure treatise 14AA (Amount in Controversy).

NASSAU COUNTY LEGISLATURE, Garden City, NY
Candidate for County Legislature – Legislative District 14, March 2021 – November 2021
Developed detailed policy proposals including on community safety. Raised over $20,000 from 200 donors. Knocked on 3,750 doors. Appeared on two national podcasts to discuss my experiences and civility in politics.

CATHEDRAL SCHOOL OF THE ANNUNCIATION, Stockton, CA
Third Grade Teacher, August 2018 – May 2021
Earned Master's in education while serving as a full-time teacher. Presented at Advancing Improvements in Education, a national conference, to over 30 teachers on how to best empower students living with trauma.

ADDITIONAL INFORMATION

Studied post-genocide peace building in Kigali, Rwanda (January – May 2016). Enjoy marathon running (kind of), baking, biking, and liberation theology.

Name: **Robert McCarthy**
Print Date: **06/04/2023**
Student ID: **N19720211**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Colleen P Campbell			
Criminal Law	LAW-LW 11147	4.0	B
Instructor: Randy Hertz			
Procedure	LAW-LW 11650	5.0	B
Instructor: Arthur R Miller			
Contracts	LAW-LW 11672	4.0	B-
Instructor: Kevin E Davis			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: John Sexton			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	B
Instructor: Melissa E Murray			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Colleen P Campbell			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Adam M Samaha			
Torts	LAW-LW 11275	4.0	A
Instructor: Catherine M Sharkey			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: John Sexton			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Catherine M Sharkey			
Education Sector Policy and Consulting Clinic	LAW-LW 12446	7.0	A
Instructor: James S Liebman			
Education Sector Policy and Consulting Clinic Seminar	LAW-LW 12447	7.0	A
Instructor: James S Liebman			

	AHRS	EHRS
Current	16.0	16.0
Cumulative	46.0	46.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Colloquium on Law, Economics and Politics of Urban Affairs: Writing Credit	LAW-LW 10321	1.0	A-
Instructor: Vicki L Been			
Colloquium on Law, Economics and Politics of Urban Affairs	LAW-LW 10634	2.0	A-
Instructor: Vicki L Been			
Antitrust Law	LAW-LW 11164	4.0	B
Instructor: Christopher Jon Sprigman			
Property	LAW-LW 11783	4.0	B
Instructor: David Jerome Reiss			
Business Torts: Defamation, Privacy, Products and Economic Harms	LAW-LW 11918	4.0	B+
Instructor: Catherine M Sharkey			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	61.0	61.0

Staff Editor - Journal of Legislation & Public Policy 2022-2023

End of School of Law Record

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of the candidacy of Robert McCarthy for a clerkship in your chambers.

Robert, currently a student at NYU Law School, is a 2018 graduate of the University of Virginia graduate (where he was the graduation speaker) and a 2020 graduate of the University of Notre Dame. His resume clearly reflects that Robert is a person of substance, but what is less clear is Robert's enormous intellect and his extraordinary work ethic. He consistently supplements his classroom achievements with co-curricular work, and has fully engaged himself not only in the life of the law but also in the life of the legal academy.

I first met Robert when he enrolled in my 1L Reading Group titled "Baseball as a Road to God: Seeing Beyond the Game." This Reading Group, based on a seminar I have taught for more than a decade, links literature about our national pastime with the study of philosophy and theology. It explores ideas contained in classic texts such as Coover' s Universal Baseball Association, Kinsella's Iowa Baseball Confederacy, and Malamud's The Natural with those found in philosophical and theological works such as Eliade's Sacred and Profane, Heschel's God in Search of Man, and James' Varieties of Religious Experience. It discusses such themes as the metaphysics of sports, the notions of sacred time and space, and the idea of baseball as a civil religion.

Robert excelled in the Reading Group. Indeed, his performance was exemplary, demonstrating exceptional ability in analyzing the assigned works and in presenting thoughtful oral arguments and analyses. Further, he made connections between the seminar materials and a far broader, interdisciplinary horizon. For example, even before the first meeting of the group, Robert wrote to me, indicating that he had pursued religious studies and public policy in college and then spent three years teaching 3rd grade at a Catholic school, so he often found himself grappling with questions of both what religious experience is and the various ways religious experience shapes individual and communities. This message was the first in a number of robust and dynamic exchanges and meetings which continue even now: Robert and I were in touch just a couple of weeks ago.

In fact, I was sufficiently impressed with Robert's work in the Reading Group that I invited him to work with me as my Teaching Assistant for the "Baseball as a Road to God" undergraduate seminar this forthcoming Fall Term. I have every confidence he will bring the same enthusiasm to the classroom for the undergrad students, and I look forward to working with him.

Robert is deeply engaged not only in the academic life of the law, but also the wider law school community. For example, he participated in the Parole Preparation Project, which assists those incarcerated to prepare for parole hearings. As Robert described it, he spent time on this project because he sought an opportunity to engage with client advocacy. He also is the incoming Executive Editor of the Journal of Legislation and Public Policy, because he indicated he wants to work closely with the development of scholarship.

In my view, Robert is an ideal candidate. He is intellectually keen and inquisitive, he is experienced in both the substantive law and scholarship, and he has demonstrated experience working effectively not only as an individual but also as an integral part of a team. It is for all these reasons it is my pleasure to write in support of his candidacy.

Sincerely,

John Sexton

John Sexton - john.sexton@nyu.edu - 212-992-8040

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Robert McCarthy for a clerkship in your chambers. I first came to know Robert as a student in my 1L Torts class during the Spring 2022 semester, in which he earned an A. Based on his strong performance in Torts, I asked Robert to be the head/coordinating Teaching Assistant (TA) for the Fall 2022 semester, as well as a Research Assistant (RA), and am glad to have done so. Robert was also a student in my Business Torts class this past semester, in which he earned a B+.

As the head Torts TA, Robert was instrumental in ensuring all TA meetings ran smoothly, and gladly assisted me with all logistical aspects of running the class without complaint. On a substantive level, he proved extremely capable in assisting me in reviewing and suggesting helpful updates to the negligence section of the course syllabus. As was shown in their course evaluations, the students assigned to his discussion section were extremely appreciative of Robert's review sessions, and his ability to explain even the most challenging aspects of the material addressed in class.

Robert's work as an RA also proved helpful to me. He assisted me with research in connection with a book review I was writing, and in particular identified helpful case law that addressed the role and impact of insurance in tort law. Robert was consistently on time with his work and receeptive to my guidance towards additional research avenues. He also helped me with final edits to the book review on a tight deadline that, moreover, required intensive work over a holiday weeekend.

Robert was a strong participant in my Business Torts class, and his final paper was an interesting exploration of the role of common law defamation in reinforcing or negating societal prejudices.

On a personal level, Robert is a mature, enthusiastic, and personable young man who is a pleasure to work with. He takes his responsibilities seriously and is highly receptive to, and adept at integrating, constructive feedback. I believe Robert would be a valuable asset to your chambers, and I hope you will seriously consider him as a candidate.

Sincerely,
Catherine M. Sharkey
Segal Family Professor of
Regulatory Law and Policy

Catherine Sharkey - catherine.sharkey@nyu.edu - 212-998-6729

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in strong support of Robert McCarthy's application for a clerkship.

As an NYU Law student, Robert spent an intensive semester in the Education Sector Policy and Consulting Clinic that I lead. This program selects law, business, education, policy, and data sciences students from multiple professional schools nationwide to spend a semester together studying and leading legal and policy research and consulting projects on the organization, governance, and regulation of public-sector institutions with a particular focus on the nation's public education systems. From this vantage point, I am able to observe my students' analytic acuity, expository writing, and oral contributions in a deeply conceptual, seven-credit seminar-style exploration of the structure, design, and transformation of public-sector institutions, as well as their capacity for practical application of what they're learning in team-based multi-disciplinary projects on behalf of public agencies. In Robert's case, the project work was on behalf of a state department of education endeavoring to embed in legislation, regulations, and practices a new approach to the selection of and preparation of educators and students to make effective use of high-quality instructional materials in literacy, mathematics, and science.

Robert came to the program with a strong interest in the lawyer's role in developing and advancing public policy, particularly at the state and local level, and with a special interest in New York City and State. In the seminar portion of the program, Robert was a regular and reliable participant in class discussions. His comments were smart and efficient. He always was well-prepared, demonstrated a strong grasp of the readings including the more conceptual ones that some of the other students struggled with, strove to put the ideas together in his own way and form his own judgments, and revealed a knack for bringing his own experiences—particularly as an elementary school teacher and a candidate for local office—productively to bear. His writing was strong, practical, and accessible to multiple audiences.

In the intensive and time-pressured project work, with high quality demands (our institutional clients pay for our services and demand strong work), Robert again generated effective written work well-targeted to the client, consistently met deadlines, responded quickly and well to feedback, effectively edited other students' work, and often took on late-appearing tasks that his efficient work on his own assignments freed him up to cover. His gentle and respectful manner, consideration for his teammates, sense of humor, and (again) his facility for clarifying matters by drawing on his own experiences, made him an especially valued colleague. His teammates' evaluations of Robert are filled with encomia both about his practical role on the team (keeping the focus on the question at hand, the client's needs, and the best way to make matters salient to the client) and his manner ("kind, open and thoughtful," "a key part of our team morale," "lit up the room and kept us positive and focused").

It was only partway through the semester that I realized that, at the same time as Robert was performing so well in and contributing so productively to all aspects of the program, he was also training for—and during the semester ran—the New York marathon. In conversations outside of class, I also found that Robert was avidly tracking and thinking about a variety of policy issues affecting local and state government, with a focus on environmental as well as public education issues. Robert's capacity for managing his time, and for keeping a broad perspective on his professional and personal interests, add to my admiration for him as a student and colleague.

For these reasons, I believe Robert would make a terrific law clerk, and I strongly recommend him for that position.

Please let me know if I can provide any other information.

Sincerely,
James S. Liebman

James S. Liebman - jliebman@law.columbia.edu - 212-854-3423

Robert McCarthy

rm6082@nyu.edu; 516-510-6673

Writing Sample

This writing sample is a final paper, which I wrote for Prof. Catherine Sharkey's Business Torts: Defamation, Privacy, Products and Economic Harms. The paper examines how society and common law interact, particularly in regards to sexuality and defamation. This sample is my original work product with no edits or feedback for a third party.

Courts both shape and are shaped by public opinion. After all, judges are members of society, capable of both setting aside prejudices and succumbing to them. As a result, culture influences common law, influencing what is and what is not a tort. Defamation, a notoriously imprecise tort even according to Prosser,[1] shows the interplay between society influencing tort and society influenced tort. With the noble tradition of common law comes noble responsibility. For this reason, judges should no longer recognize a statement that states someone is not straight as defamatory, and this should apply to both *per se* and *per quod* defamation. Sexuality-based defamation should no longer be actionable because courts should neither assume nor find reputational or economic harm.

Courts should not be open forums to litigate sexuality, including what sexuality is and what sexuality isn't. While the contours of sexuality can be debated, one way to conceptualize sexuality is in its division of status and conduct. Since *Bowers v. Hardwick*, and even before, the courts inability to grapple with these questions has been clear. In the past, courts were willing to deem the mere invocation that someone is gay, lesbian, or bisexual as *per se* defamatory, meaning that courts participated in condemning status. Both conduct and status should be beyond the reach of defamation. One way of expressing sexuality is as a private aspect of one's identity, even if many individuals choose to live their sexuality publicly. However, just because the majority of individuals choose to live their sexually publicly does not mean that the ability for someone to keep this private should not be respected by the courts.

While courts once found defamatory claims actionable when acts of homosexuality were criminalized, courts must interpret the law with an eye towards societal realities. At the same time, courts should not discard all precedent. Yet, sexuality-based defamation serves a double

[1] Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 691 (1986).

bind by ensuring straight people can recover and reinforcing negative stereotypes. No one likes having inaccurate statements spread about oneself, and courts are not removing all causes of action; privacy related torts can fill in the gap, leaving the correct cause of action intact for individuals who are either straight or a sexual minority.[2] In order to most convincingly make these arguments, the roadmap is as follows.

First, defamation and what interests it protects will be explored. Second, cases that show the interaction between sexuality and defamation will be prodded and compared. Third, privacy related torts will be offered as torts that allow recover without reinforcing prejudicial thinking. Finally, specific examples of how privacy torts may cover this space will be presented.

First, jurisdictions often divide defamation into two categories: *per quod* or *per se*.[3] A *per se* defamatory publication involves "statements so harmful to reputation that damages are presumed."[4] On the other hand, *per quod* defamatory publication involves "statements requiring extrinsic facts to show their defamatory meaning."[5] While each state defines *per se* slightly differently, the categories are quite similar.

As articulated in *Muzikowski*, common law in Illinois offers five categories of *per se* defamation: criminal offense, infection with a venereal disease, inability or corruption in public office, fornication or adultery, or prejudice in trade, profession or business.[6] In New York, the "four established 'per se' categories recognized by the Court of Appeals are 'statements (i)

[2] In culture, "straightness" has been presented as normative, and "nonstraightness" as a derivation of the norm. Defamation is a value laden tort, relying on the premise that one feels inferior or shameful, and this needs to end. Sexual minority was used above to be the most inclusive term but throughout this paper gay, lesbian, and bisexual are most often used. Two notes deserve mention. First, this is not to imply the challenges of people whose sexualities are not listed have not been defamed, and defamation for all sexual identities should end. Second, the burgeoning social movement for acceptance will likely not be for sexuality-based rights but gender-based rights. While there are certain areas of overlap, this overlap is not complete. In offering a roadmap for ending defamation for sexuality-based defamation, hopefully principles can be applied to an analogous, but not identical, overdue social movement.
[3] *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 924 (7th Cir. 2003).
[4] *Id.*
[5] *Id.*
[6] *Id.*

charging [a] plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that [a] plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman.'"[7] Historically, same-sex activity would be criminalized. Contemporarily, figuring out where stating that someone is gay, lesbian, or bisexual fits in is challenging.

Defamation has two major elements: publication and defamatory statements. While each court may slightly tweak the exact definition of defamation in their jurisdiction, defamation must always include unprivileged publication to a third party.

RST § 577 explains that publication is "communication intentionally or by a negligent act to one other than the person defamed." Further, liability extends when someone "intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control." At times, the definition of publication might seem incongruous, or even changing itself. For example, in *Mimms v. Metropolitan Life Ins. Co*, the 5th Circuit did not find publication. In this case, Mimms asked Alabamian Sen. Sparkman to write a letter to Metropolitan Life Insurance Co. asking why Mimms was fired. Disagreeing with New York precedent that would categorize a stenographer as a third party, the 5th Circuit holds that both the president and the stenographer were acting as one corporate agent of Metropolitan Life. Therefore, they could not be treated as a third party. Further, the court did not find Sen. Sparkman to be a third party because he was acting as Mimms's agent. In dissent, Judge Rives explains that he found a third party in both to the stenographer and Senator Sparkman.

While most cases involving sexuality will not quibble over what constitutes publication, *Mimms* instructs in another way by underscoring that courts will whittle common law. In this case, precedent was modified, offering a shield for a corporation on an "agent" theory, where concerted effort would neutralize the existence of a third party. Similarly, courts can look at

[7] *Yonaty v. Mincolla*, 97 A.D.3d 141, 144 (2012).

defamation *per se* and state their resistance to assuming damages. After all, if the meaning of publication is open to debate and responsive to the growth of corporations, what constitutes damage should be up to debate and responsive to the (long overdue) acceptance of lesbian, gay, and bisexual individuals.

The second element of defamation is a defamatory statement. According to the RST § 588 defamation includes the following elements: a false and defamatory statement, fault, and harm. Implicit in this understanding is the duty not to defame, but what is not clear is how society would define defamation. In order to determine what is defamatory, what constitutes acceptance and what constitutes community must be answered.

In regards to acceptance, both acceptance of marriage and moral acceptability can show national opinion. A May 2022 Gallup survey showed, 71% of surveyed individuals thought same-sex couples should have their civil marriages recognized while 28% did not.[8] These numbers should be compared to an almost complete inversion from the 1996 May Gallup poll where 27% of surveyed individuals viewed same-sex civil marriage as valid while 68% did not.[9] These statistics parallel general moral acceptance of gay and lesbian relations, with 71% of surveyed individuals saying gay and lesbian relations are "morally acceptable" and 25% of surveyed people saying these relationships were "morally unacceptable."[10] Court have shifted in other ways relating to sexuality, including in jury instructions for criminal cases. Whether as a mitigating consideration or a complete defense, courts once considered a same-sex advance to be a reasonable provocation for murder.[11]

[8] Gallup. In Depth: Topics A to Z - LGBT Rights. https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx.
[9] *Id.*
[10] *Id.*
[11] Joshua Dressler, *When Heterosexual Men Kill Homosexual Men: Reflections on Provocation Law, Sexual Advances, and the Reasonable Man Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 726-27 (1994-1995).

Courts should not wait until 100% of people surveyed support same-sex marriage or find these relationships morally acceptable. Waiting for a threshold of 100% seems both impractical and strained. Further, courts will operate within the bounds of society and should not be viewed as activists or unelected legislators with a 70% support rate. With these levels of social acceptance, harm should not be assumed for *per se* defamation. In fact, courts should not be bound by previous minoritarian judicial thinking and should not accept harm for *per quod* sexuality-based defamation. Courts need to fully condemn thinking that allows being called lesbian, gay, or bisexual to be defamatory.

In the past, courts have declared *per se* defamation for causes of action that society would certainly not view as defamatory today. For example, the Supreme Court of South Carolina upheld that misidentifying a white person as Black could lead to liability for *per se* defamation.[12] In ruling, the court explained that being misidentified as Black impacts one's standing in society and brings one down in the estimation of friends.[13] In so doing, the Supreme Court of South Carolina further reinforced racism in its courts and its laws. As evidenced by this, courts exist in their communities. If courts continue to accept claims of defamation when discussing people's sexuality, courts will reinforce homophobia. Allowing a defamation action strikes at principles of equality.

As far as determining the "community," two questions should be probed, both of which can be done briefly. First, what community should be used? Second, should defamation be able to apply to communities?

First, there should be a national standard to apply. Statistically, the nation accepts same-sex relationships. While some states, such as New York, may exceed the national average, and

[12] *Bowen v. Independent Publishing Company*, 230 S.C. 509, 513 (1957).
[13] *Id.*

some states, such as Mississippi, may be below, a national standard should be pursued. In many ways, this implicates the "reasonable" or "ordinary" person standard. Indeed, when data shows what an ordinary person thinks, the ordinary person may best be a national ordinary person. Mindful of the past interventions of the United States Supreme Court in defamation law, this does not serve as an invitation for intervention.

Common law has a role to play in recognizing people's rights. The next wave of defamation may not rest with sexuality-based actions but gender-based actions. Once again, the courts should step in and note that being called transgender is not a form of defamation.[14] The court needs to recognize the psychological, moral, and political messages sent by what it defines as defamation.

Second, defamation will almost always refer to an individual in order to meet the "of and concerning" element. However, in a few instances, group defamation has been found actionable. In *Elias v. Rolling Stones LLC*, for the first time, the Second Circuit formally recognized that small group defamation existed. Judge Lohier held that subsequently proven false accusation in a *Rolling Stones* article about of a fraternity of 57 members at the University of Virginia committing sexual assault could be considered "of and concerning" the plaintiffs. While this logic applied well to this case, it must be contained. Well before *Elias*, precedent exists in the Second Circuit in *Neiman-Marcus v. Lait*.[15] Here, the court held that a cause of action existed to allow a class-action defamation suit involving claims that a group of twenty-five employees was composed of mostly gay men. *Neiman-Marcus* serves as a forerunner to *Elias* in recognizing group defamation. Both *Elias* and *Neiman-Marcus* show the importance of having small groups

[14] Indeed, this proposition animates *Simmons v. American Media, Inc.,* No. BC660633, 2017 WL 5325381 (Cal. Super. Sept. 1 2017). The opinion notes "even if there is a sizable portion of the population who would view being transgender as negative, the court should not… 'directly or indirectly, give effect to these prejudices.'"

[15] 13 F.R.D. 311 (S.D.N.Y. 1952).

where defamatory statements have a high degree of fungibility and could apply to anyone. If a publication of sexuality should no longer be considered defamatory for an individual, rather logically, a publication of sexuality should not be considered defamatory for a group.

Both acknowledging the inherent confusion and seeking to bring order to this confusion, Robert Post offers three frames to conceptualize what defamation protects: honor, dignity, and property.[16] While all three lens offer important viewpoints into defamation, dignity presents the strongest case for ending defamation in regards to sexuality. Quoting Justice Stewart's concurrence in *Rosenblatt v. Baer*, Post notes the challenges of conceptualizing dignity, despite Justice Stewart's poetic invocation of "our basic concept of the essential dignity and worth of every human being."[17] This dignity manifests itself as respect and self-respect.[18] Traditionally, defamation protects dignity by preventing belittling. Being called something you are not is painful. Being defamed is painful, but being called lesbian, gay, or bisexual should be neither defamatory nor painful. The statements should be neutral, much like a statement incorrectly stating someone's eye color. Therefore, in this instance, the courts upholding sexuality-based claims as defamatory serves as the wrong.

Of course, defamation conversations in the United States take place in the long and pervasive shadow of *New York Times v. Sullivan* and its progeny. In its constitutionalization of defamation, *New York Times* froze and sullied the reputable common law tradition. Legislatively, section 230(c) Communications Decency Act of 1996 extended protections to the then fledgling Internet, also limiting defamation liability. However, the protections offered by the Communications Decency Act of 1996 may be modified this summer by the Supreme Court, and there is an appetite to reconsider the precedent from *New York Times v. Sullivan*. Algorithms

[16] Robert Post, *supra* note 1, at 693.
[17] *Id.* at 707, quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).
[18] *Id.* at 711.

implicate interesting questions in regards to privacy (i.e., does a suggested ad or mailing invade on privacy?). Safe to say, the Internet without the ability to target ads via data because of privacy concerns would look quite different. As seen in the oral argument for *Gonzalez v. Google*, these questions play a large role in society, but judges are not the best equipped to answer them.

Second, previous cases exploring the relationship between sexuality and defamation should be brought into conversation to help elucidate the pitfalls of sexuality-based defamation claims. The first case comes from Massachusetts District Court in 2004, the subsequent pair of cases come from New York only four years apart, and these cases show how judges are interacting with societal opinion.

In *Albright v. Morton*,[19] on a motion to dismiss, the judge wrote, "[i]n 2004, a statement implying that an individual is a homosexual is hardly capable of a defamatory meaning."[20] The case took place after *Lawrence v. Texas* and the Supreme Judicial Court of Massachusetts declaring it unconstitutional in Massachusetts to not allow same-sex marriage. The opinion noted that upholding sexuality-based defamation is an act of prejudice and bigotry[21] and that to acknowledge defamation here would reinforce the unjust second-class citizenship of same-sex couples.[22] While, Albright attempts to recover under false light, a more appropriate and less value laden tort, the judge noted that Massachusetts does not recognize the tort of false light and refused to expand it for this case.[23]

A diametrical opposed pair of New York cases, one in S.D.N.Y and one in state court, show how judges interact with common law. In the 2008 S.D.N.Y. case *Gallo v. Alitalia-Linee*

[19] 321 F.Supp.2d 130 (2004).
[20] *Id*. at 132.
[21] *Id*. at 133.
[22] *Id*. at 138.
[23] *Id.* at 140.

Aeree Italiane-Societa per Azioni,[24] Gallo sought to recover under *per se* defamation after being called gay by his boss. The court explained that "certain people view homosexuality as particularly reprehensible"[25] even if "[t]he Court recognizes that many in our society no longer hold such beliefs … homophobia is sufficiently widespread and deeply held that an imputation of homosexuality can—at least when directed to a man married to a woman—be deemed every bit as offensive as imputing unchastity to a woman."[26] In a footnote, the judge offered, "[a]ll the sexual categories of slander per se appear somewhat outmoded in view of contemporary mores,"[27] but based on New York state court precedent, the judge noted both being confined and the challenge of interpreting rules upholding homophobia. While this plaintiff could not recover under intrusion upon seclusion (seemingly, his boss was a bigoted bully), the plaintiff could recover on false light. Noting his discomfort, the judge applied rather than shaped the common law. This judicial act upheld homophobia and underscores the need for courts to adapt to times.

Just four years later in the Second Division of the New York Supreme Court, *Yonaty v. Mincolla*[28] came to the exact opposite conclusion as *Gallo*. Here, the harm to Yonaty was quite clear as the defendant schemed to ensure that Yonaty's girlfriend would hear a rumor that Yonaty was gay or bisexual, which ultimately set into motion the dissolution of Yonaty and his girlfriend's relationship.[29] In response to Yonaty's claim that being called gay or bisexual is *per se* defamation, the court flatly refused, and not just for one reason but for multiple. The court noted that being called gay was *per se* defamation in the past because this imputed shame, insinuated a "serious crime," and occurred in a pre-*Lawrence* world.[30] Further, in disagreeing

[24] 585 F.Supp.2d 520 (2008).
[25] *Id.* at 549.
[26] *Id.*
[27] *Id.* at 555 n.16.
[28] 97 A.D.3d 141.
[29] *Id.* at 142.
[30] *Id.* at 144.

with another division of the New York Supreme Court, the court noted that "at this point in time" served as a previous justification.[31] The point in time had shifted, and the courts felt no obligation to uphold the homophobia inherent in that decision. Opportunities for recovery will still exist as sexuality-based defamation fades to the history books.

Third, defamation should no longer encompass statements involving sexuality. Instead, plaintiffs should seek recovery under privacy related torts including intrusion upon seclusion, public disclosure of embarrassing private facts, and false light. While embarrassing does not carry the same baggage as defamation, referring to someone's sexual identity as embarrassing is hardly a step forward. The harm should be recognized as force disclosure of private information, not being called lesbian, gay, or bisexual. False light, which comes with less laden and shame inducing words, can still stand as an option for straight individuals who were called lesbian, gay, and bisexual. After all, society should limit falsehoods.

Privacy is particular fitting as a cause of action because it may have served as the desire for Warren to team up with Brandies to write *The Right to Privacy.* Although debate swirls, the spark for Warren may have been protecting the privacy of his gay brother.[32] Of course, the nobility of this act depends on whether Warren acted out of care or out of embarrassment. Conceptually, two essential questions are raised by empowering intrusion upon seclusion: who is owed this privacy and how should damages be calculated.

Privacy is a general duty owed but does not extend to all aspects of life. According to RST § 652B, the intrusion must be both intentional and highly offensive. While duty is the first step in analyzing negligence-based torts, for an intentional tort like intrusion upon seclusion, duty serves as an exoskeleton. If the realm of intrusion on seclusion is expanded too widely,

[31] *Matherson v Marchello*, 100 A.D.2d 233, 241 (1984).
[32] Sue Halpern. *Private Eyes*. NEW YORK REVIEW OF BOOKS. Mar. 9 2023, https://www.nybooks.com/articles/2023/03/09/private-eyes-the-fight-for-privacy-citron/.

conservations will be quite quiet, as they wouldn't be able to happen. As analogy, damages spring from ideas present in trespass to land where damages were assumed. This idea is more fully explored in *Boring v. Google Inc*,[33] where taking a picture was analogized to physical trespass.

Using privacy-based torts addresses an incongruency currently embedded in the law: truth as complete defense. For example, if a newspaper were to publish a story with a photo captioned, "X is seen with his boyfriend taking advantage of a Restaurant Week," an act for defamation would open. If X were straight, he would be able to sue saying he was defamed. If X were gay and closeted, he would also be able sue, but the newspaper could invoke a defense of truth. Of course, this seems unlikely now, but this possibility still does exist. This argues for another reason why sexuality-based torts should be migrated strictly to privacy; operating under a privacy regime, as opposed to defamation regime, equalizes recovery for both straight and lesbian, gay, and bisexual individuals.

Further, privacy serves as a much more appropriate deterrent than defamation and allows gay, lesbian, and bisexual individuals to protect themselves. While tort has many purposes, damages tend to assist either deterrence or wholeness. Certainly, financial compensation helps make one whole, but in very few instances (i.e., intentional interreference with prospective advantage) can tort come close to succeeding in that goal. Tort should focus on keeping people whole rather than making people whole. That is proper deterrence. A forced outing is essentially nonquantifiable, and thus, economically challenging to compensate. Sexuality-based defamation uniquely hurts gay, lesbian, and bisexual individuals, depriving them of their ability to recover and reinforcing exclusionary mindsets. Additionally, moving to a privacy-based model creates clear lines. If someone has publicly stated their sexuality whether through word or deed, the

[33] 362 Fed. Appx. 273 (3rd Cir. 2010).

press can report on it; if someone has not, this part of their life remains private. This will help keep reporting more issue focused and less personality driven.

Of course, this is far from a panacea, and *Sipple v. Chronicle Publishing Co.* [34] shows the limits of recovery under a privacy-based tort regime. After Sipple prevented an assailant from shooting President Gerald Ford, potentially saving his life, publicity followed.[35] In this publicity, one columnist noted that Sipple was gay, a fact he had not shared with his family.[36] Regrettably, when Sipple's family found out, they abandoned him, causing him emotional pain. The court held that this publication was newsworthy, non-intrusive, and helped counteract negative stereotypes about gay individuals.[37] Such is the costs of litigation – sometimes your client loses but a societal movement wins. Yet, anytime an action is deemed defamatory when relating to sexuality, that client wins, but society loses.

From an incentive-based level, the *Sipple* case should be evaluated further for two competing ideas. First, *Sipple* invokes important questions about "community" not mentioned in the discussion of community above. In Sipple's case, one of the communities that seemed to matter most to him was his family, and as a result of the reporting, Sipple painfully lost his connection to his family. Second, *Sipple* shows how migrating sexuality-based torts to intrusion on seclusion is equalizing. Sipple would not have been able to sue for defamation because he was gay, and suing for defamation only serves as an option for straight individuals. Related to the familial point above, if Sipple's family didn't automatically cut him out but instead kept their distance, Sipple most likely would have outed himself by not pursuing a defamation claim. Defamation serves as a forced outing. While the process of sharing one's sexuality is different

[34] 20 Cal. Rptr. 665 (Ct. App. 1984).
[35] *Id.*
[36] *Id.*
[37] *Id.*

for each person, autonomy and freedom stand as two important bedrocks. Sexuality should be shared not forced out.

Two contemporary examples related to privacy and defamation include *New York Times'* expose of former Mayor Ed Koch and Peter Thiel's laser-focused takedown of Gawker.[38]

First, former Congressman, former mayor, and (maybe most importantly) NYU Law alum, Ed Koch never discussed his sexuality while serving as mayor or after. Dying in 2013, Mayor Koch lived well into a more accepting time but still adamantly chose to keep his sexuality private from the press. Mayor Koch also ran for election when it was still acceptable for people who did not plan on voting for him to make signs saying, "Vote for Cuomo, Not the homo."[39] While many people speculate and discuss his sexuality, the *New York Times* treated this topic with deep focus, publishing an expose.[40] The piece was highly unnecessary and added nothing to the public discourse. Mayor Koch clearly sought to keep this element of his life private, and he was entitled to this.

Running for and serving in public office does not completely foreclose a private life. Of course, this does not mean that a mayor can simply protect all information under the umbrella of privacy, but Mayor Koch did not seek to have sexuality as part of his public life. For example, former Mayor Michael Bloomberg was known for enjoying frequent weekend trips to

[38] Nicholas Lemamm. *How Peter Thiel's Gawker Battle Could Open a War Against the Press*. NEW YORKER. May 31, 2016, https://www.newyorker.com/news/news-desk/how-peter-thiels-gawker-battle-could-open-a-war-against-the-press.
[39] Jen Chung. *Ed Koch Held Decades-Long Grudge Against Cuomos Over "Vote For Cuomo, Not The Homo" Posters*. GOTHAMIST. Feb. 1 2013, https://gothamist.com/news/ed-koch-held-decades-long-grudge-against-cuomos-over-vote-for-cuomo-not-the-homo-posters.
[40] Matt Flegenheimer & Rosa Goldensohn. *The Secrets Ed Koch Carried.* N.Y. TIMES. May 7, 2022, https://www.nytimes.com/2022/05/07/nyregion/ed-koch-gay-secrets.html.

Bermuda.[41] This directly impacts the job a mayor can do and the frequency of the trips warranted disclosure.

Second, Peter Thiel made it one of his missions to bankrupt Gawker after Gawker disclosed that Peter Thiel was gay.[42] Peter Thiel found his opportunity after Gawker published a video of Hulk Hogan having sex by financing the costs of litigation for Hulk Hogan and his lawyers.[43] Importantly, Hogan won his case not on a defamation claim but on an invasion of privacy claim.[44] This does not offer a roadmap forward in regards to litigation strategy, but this example underscores the need for recovery to exist when people are outed and the priority individual's place on privacy.

Courts and common law shape society, and neither the common law nor the courts should reinforce homophobia, which they currently do through allowing sexuality-based defamation. Instead, the common law should protect everyone's privacy, regardless of their sexuality. A regime based on privacy is much more respectful of people's identity, serves as a proper incentive to deter, and responds to a shift in societal acceptance of lesbian, gay, and bisexual individuals.

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[41] Michael Barbaro. *New York's Mayor, but Bermuda Shares Custody.* N.Y. TIMES. Apr. 25 2010, https://www.nytimes.com/2010/04/26/nyregion/26bermuda.html.
[42] Wall Street Journal. *Billionaire Who Helped Bankrupt Gawker Explains Why*, YOUTUBE (Nov. 1, 2016), https://www.youtube.com/watch?v=_z4TGEhtdDA.
[43] *Id*.
[44] Nick Madigan & Ravi Somaiya. Hulk Hogan Awarded $115 Million in Privacy Suit Against Gawker. N.Y. TIMES. Mar. 18, 2016, https://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html.

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BA/BS From	**State University of New York-Binghamton**
Date of BA/BS	**May 2018**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Human Rights Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Frederick Douglass Moot Court Team**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 01, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year student and member of the Human Rights Law Review at Columbia Law School. I write to apply for a clerkship in your chambers beginning in 2024 or any term thereafter.

The prospect of starting my legal career clerking in your chambers is particularly appealing due to your dedication to public service. I plan to pursue a career in private practice and public service, and your journey to the bench inspires me. The opportunity to gain practical experience with our federal court system by serving as a clerk will provide me with invaluable insight into the mechanisms that define the legal system. My relentless work ethic, research, and writing skills are strengths that I bring to this position. At Columbia, I have honed my research and writing skills as a national competitor in the Thurgood Marshall Moot Court competition, policy fellow for the Broadway Advocacy Coalition, and student attorney in the Criminal Defense Clinic. Last semester, I gained clinical experience working with indigent clients facing misdemeanor charges and successfully argued for the dismissal of my clients' cases. Currently, I co-lead a team of students working to reimagine the Human Rights Law Review's *Jailhouse Lawyers Manual (JLM)*. Our team is working with formerly incarcerated consultants to produce editions of the manual that include examples and visualizations informed by *JLM's* primary users. This initiative seeks to improve the resources available to incarcerated individuals by centering their community in the development of the publication. I would appreciate the opportunity to apply these skills in a clerkship position and to discuss these experiences in more detail.

Enclosed please find a resume, transcript, and writing sample. Following separately are letters of recommendation from Professors Amber Baylor (212-854-8221, abaylor@law.columbia.edu), Susan Strum (212-854-0062, ssturm@law.columbia.edu), Kendal Thomas (212-854-2288, kthomas@law.columbia.edu), and Eben Moglen (212-854-8382, moglen@law.columbia.edu). Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Respectfully,

Jermel McClure, Jr.

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EDUCATION

Columbia Law School, New York, NY
J.D. expected May 2024
Honors: James Kent Scholar
Activities: Columbia Law School Black Men's Initiative, Co-President
Racial Literacy for Racial Justice, Co-Founder
Columbia Law School Student Senate, Secretary
Columbia Human Rights Law Review – Jailhouse Lawyers Manual, Staff Editor
Frederick Douglas Moot Court, National Competitor
Millstein Center for Global Markets & Corporate Ownership, Student Fellow
Paralegal Pathways Initiative, Participant Recruitment & Mentorship
Criminal Defense Clinic – Teaching Assistant

Binghamton University, Binghamton, NY
B.A., *cum laude*, received May 2018
Major: Political Science
Activities: Binghamton University Student Association, Student Body President
Binghamton Alumni of Color Network, Founding President

EXPERIENCE

Quinn Emanuel Urquhart & Sullivan, LLP, Washington, DC
Summer Associate Summer 2023
Conducted legal research and drafted memoranda on a variety of litigation matters. Assisted with sensitive white-collar investigations and several pro bono matters.

Broadway Advocacy Coalition, New York, NY
Policy Fellow January 2023 – Present
Design political strategy for the Solutions Not Suspensions Initiative, New York Senate Bill S1040. Counsel playwrights on the incorporation of advocacy and activism in their works.

Morrison & Foerster, LLP, Washington, DC
Law Clerk August 2022 – May 2023
Evaluated the national security landscape and used insights garnered to draft Client Alerts. Produced sector specific research memos to advance client goals.

Wetmore Fellow – Summer Associate Summer 2022
Conducted internal investigations compiling information needed to draft voluntary self-disclosures for clients navigating OFAC sanctions. Drafted model legislation mandating diversity on state boards and commissions. Researched nationwide state specific requirements for separation agreements.

SEO Law Fellow Summer 2021
Assisted trial counsel in complex bankruptcy litigation. Analyzed and organized discovery documents for complex litigation matters. Assembled privacy due diligence recommendations for M&A deals. Hosted a Podcast covering the firm's partnership with The Southern Poverty Law Center.

BLACE, New York, NY
Founding Member, Account Manager October 2019 – June 2020
Managed relationships with key stakeholders at top fortune 500 companies, growing sales revenue by 30% within three months. Collaborated with the Director of Sales Operations to implement innovative processes.

J.P. Morgan, Private Bank, New York, NY
Private Banking Analyst June 2018 – October 2019
Prepared research materials analyzing client performance, risk-adjusted returns, and the success of strategic allocations resulting in increased assets undermanagement of over $500 million. Built and maintained relationships with institutional and individual private equity clients coordinating effective communication between clients and back-office stakeholders to ensure superior customer service.

TECHNICAL SKILLS: Series 7 & Series 63 Certified
PHILANTHROPIC AFFILIATIONS: Pi Beta Chapter of Alpha Phi Alpha Fraternity, Incorporated
INTERESTS: Real Estate, Travel, Theatre, Track & Field, Fine Dining

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CLS TRANSCRIPT (Unofficial)

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Program: Juris Doctor

Jermel M McClure

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L9401-1	Advanced Breakthrough in Abolition Through Transformative Learning Exchange	Sturm, Susan P.	2.0	A
L9244-1	Criminal Defense Clinic	Baylor, Amber	3.0	A
L9244-2	Criminal Defense Clinic - Project Work	Baylor, Amber	4.0	A
L6269-1	International Law	Cleveland, Sarah; Clooney, Amal	4.0	
L8517-1	Workshop on Facilitating Meaningful Reentry II	Genty, Philip M.; Strauss, Ilene	2.0	CR

Total Registered Points: 15.0

Total Earned Points: 11.0

January 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L8413-1	S. Theater of Change: Reimagining Justice through Abolition	Squillace, Leia; Sturm, Susan P.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Shechtman, Paul	3.0	CR
L6675-1	Major Writing Credit	Genty, Philip M.	0.0	
L6274-3	Professional Responsibility	Rose, Kathy	2.0	B+
L9032-1	S. Breakthrough in Abolition Through Transformative Learning Exchange	Rodriguez, Alejo; Sturm, Susan P.	2.0	A
L9032-2	S. Breakthrough in Abolition Through Transformative Learning Exchange - Project Work	Rodriguez, Alejo; Sturm, Susan P.	1.0	CR
L9219-1	S. Critical Race Theory Workshop	Forbes, Flores; Thomas, Kendall; Wilson, Michelle	3.0	A
L6683-1	Supervised Research Paper	Genty, Philip M.	2.0	CR
L8509-1	Workshop on Facilitating Meaningful Reentry I	Genty, Philip M.; Strauss, Ilene	2.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	B
L6667-1	Frederick Douglass Moot Court	Yusuf, Temitope K.	0.0	CR
L6177-1	Law and Contemporary Society	Moglen, Eben	3.0	A
L6121-40	Legal Practice Workshop II	Yusuf, Temitope K.	1.0	P
L6116-4	Property	Merrill, Thomas W.	4.0	B
L6118-2	Torts	Rapaczynski, Andrzej	4.0	B

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-4	Legal Methods II: Methods of Persuasion	Genty, Philip M.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	B
L6133-3	Constitutional Law	Bulman-Pozen, Jessica	4.0	B
L6105-4	Contracts	Emens, Elizabeth F.	4.0	B
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-16	Legal Practice Workshop I	McGinnis, Michael Charles; Moe, Alison; Whaley, Hunter	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 62.0
Total Earned JD Program Points: 58.0

Columbia
Law School

Amber Baylor
Clinical Professor of Law
Director, Criminal Defense Clinic

435 West 116th Street
New York, NY 10027

abaylor@law.columbia.edu

June 9, 2023

Dear Judge:

I am writing to strongly recommend Jermel McClure for a judicial clerkship. I worked with Jermel as a student in the Criminal Defense Clinic. He is one of our most well-rounded, engaging and reliable students. Jermel brings energy and attentiveness to all of his work. His attention to detail, steadiness, engaging work style, and high-level communication skills will serve him well as a clerk.

Jermel is exceptionally engaged. My colleagues have commented on Jermel's thoughtfulness. He connects projects across the school, noting overlapping and common goals. He truly takes on the mission of the centers, courses, fieldwork opportunities and is a significant contributor across the school.

In the Criminal Defense Clinic students represent individuals facing misdemeanor charges and work as counsel to a grassroots organization on a policy project. The clinic involves a seminar component. Jermel was always prepared for class, responded to prompts, and was a thoughtful contributor to the conversation. His class papers were deeply self-reflective. Jermel took advantage of the opportunity to ask guest speakers well-crafted, probing questions about their area of expertise. He clearly contemplates how to best apply class lessons to practice. He brings a genuine interest into the discussion.

Jermel is focused on developing high-level lawyering skills. In class litigation simulations, Jermel would ask if he could refine his cross examination after receiving feedback. He sought out feedback on his legal memoranda for his clients. When I have referred him to practitioners for mentorship, Jermel follows up and is well-prepared.

Jermel's representation of his clients was excellent. He was diligent in following up with his clients – often having scheduled client meetings and calls without supervisor prompting. He dedicated time and effort to be truly collaborative - his clients were always apprised of the state of their case. Jermel proactively followed up with the prosecutor on unaddressed requests. He and classmate

volunteered to collaborate in the representation of additional client – which was complex and involved research on a novel issue.

Our organizational client representation required Jermel to work with two other classmates. He was a strong collaborator. Our client subsequently commented on the excellent policy research his team produced.

Jermel is a major contributor to the Law School. I recommend him without reservation to a judicial clerkship.

Please feel free to contact me with any inquiries regarding Jermel and his preparation for this position. I can be reached at abaylor@law.columbia.edu.

Sincerely,

Amber Baylor

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Jermel McClure has asked me to write in support of his application for a clerkship in your Chambers. I do so with the greatest enthusiasm.

I have known Mr McClure since his second term in law school, when he was in my class called Law in Contemporary Society. I have seen him frequently and acted as his advisor since.

Mr McClure is a natural leader. He has the quickness of intellect and intensity of presence that combine to produce charisma. He is an organized and rapid thinker, a social entrepreneur in the making, a gifted connector of people. He writes fluently, sometimes beautifully. He has the incisiveness and the sureness of touch with people that could carry him far in the courtroom. I knew William J. Brennan, Jr., a little bit at the beginning of my career, from my perch in Justice Marshall's Chambers; Mr McClure reminds me of him sometimes.

Jermel could be an outstanding law clerk at the beginning of an extraordinary career. I urge you to interview him. If there is anything else I can do to assist you, please call on me.

Very truly yours,

Eben Moglen

Eben Moglen - moglen@law.columbia.edu - 212-854-8382

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write at the request Jermel McClure, who has applied for a clerkship position in your chambers. It's my pleasure to recommend him to you.

I have known Jermel since the fall of 2022, when he enrolled in the seminar I co-teach here at Columbia on critical race theory. Jermel quickly emerged as a thought leader in the seminar. He came to our weekly meetings prepared and ready to dig into the cases and other materials we covered in the seminar. In his contributions to class discussion Jermel demonstrated his solid legal analysis skills and a keen critical eye for larger policy issues. Each seminar student was responsible for two projects. The first was an individ-ual "dossier-memo" assignment. The students were asked to prepare a dossier of law and policy materials on a topic of their choice, and to write a memorandum that used one or more CRT concepts as a lens for a critical analysis of their chosen topic. Jermel prepared a fine dossier-memo on the culture war that has erupted among residents of New York's gentrifying Harlem neighborhood over the longstanding tradition of weekly African drumming circles in Harlem's public parks. The second assignment was a team project in which Jermel worked with two other seminar members to write and produce a podcast episode for the second season of CRT2, a law-school based podcast on critical race theory. Jermel was responsible for the creating and curating the website for the podcast he and his fellow team members produced on the use of art as a tool of restorative justice among formerly incarcerated New Yorkers and the communities to which they return after they are released from prison. Jermel received a well-deserved "A" for his work in the seminar.

Outside the classroom, I've worked closely with Jermel on student-facing projects related to racial and social justice, two issues about which he is quite passionate. Jermel has played an important leadership role in the life of the law school around both these issues. He served as co-president this past year of the Black Male Initiative, a project that was created early on in the pandemic to connect current black male law students with black male graduates of Columbia Law School. Jermel and his co-president planned and curated an impressive calendar of substantive and social events. Jermel is also co-leading an initiative to create a student-facing group to address issues of racial and social justice literacy. He has not only been an effective student leader and organizer, but has had great success in raising funds for these initiatives. Jermel has an impressive work ethic. He is very good at receiving and implementing feedback, and is a self-directed learner who has the capacity to think and act beyond the scope of what is expected of him. He has strong interpersonal skills, a natural ability to work well with others and a maturity far beyond his years.

I am pleased to recommend Jermel to you, and look forward to a chance to speak by phone about any questions that arise as you evaluate his candidacy.

Yours truly,

Kendall Thomas
Nash Professor of Law

Kendall Thomas - kthomas@law.columbia.edu - 212-854-2288

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is with great pleasure that I write to recommend Jermel McClure for a position as your law clerk. Jermel is one of the most inspiring student leaders I have encountered since I have been in law teaching. His combination of intellectual firepower, inexhaustible energy, contagious commitment, deep insight, and strength-based humility is remarkable. He is a master problem solver, a tireless community builder, a deep thinker, a brilliant strategist, and a prodigious worker. He combines these qualities with a breathtaking range of experiences in the classroom, in leadership positions, and in his community that have enabled him to bring invaluable perspective, judgment, and creativity to his research, leadership, and public speaking. He has my strongest recommendation.

As his faculty mentor, I had many opportunities to work closely with Jermel. I am continually re-inspired by him every time we meet. He combines his intellectual abilities with strong organizational skills and a commitment to making a meaningful and lasting difference in the lives of others. He has boundless energy and devotes whatever time is needed to bring people together, make informed judgments, and achieve defined goals. He is the one that a group relies on to inspire a sense of possibility, identify outstanding issues, plan next steps, and ensure the work gets done. He is a realistic visionary who understands the world as it is but has a sense of urgency and hope that seems to propel him and those around him to act.

I first got to know Jermel through Breakthrough in Abolition Through Transformative Learning Exchange (B.A.T.T.L.E), a year-long, intensive action research course that I co-teach with a formerly incarcerated leader. This experiential learning seminar requires collaborating extensively with people directly affected by mass incarceration and racism on projects inside and outside of class, completing regular reflective and strategic writing assignments, and conducting a major collaborative action research project. Through this work, I had the opportunity to observe Jermel's policy research, issue analysis, and interpersonal interactions with a diverse group.

Jermel quickly emerged as a thought leader among leaders in BATTLE. His powerful, subtle, and searching mind was consistently apparent in his in-class comments, reflection pieces, questions, facilitation plans, and writing. Jermel tackles problems through careful, rigorous, and tough-minded analysis, informed by taking the pulse of people's experiences. He has a thirst for figuring out underlying causes and broader implications. He combines "forest" and "trees" thinking—with his attentiveness to distinctions and details as well to underlying patterns and dynamic relationships. His incisive inquiries, often carefully inserted at just the right moment, frequently clarified and focused the discussion on core issues. He framed precise and targeted questions in the classroom discussion and the project planning, and demonstrated a rare combination of intellectual open-mindedness and focus. These qualities equipped Jermel to excel as an interlocutor, framing questions in class and in the project group's research, and a strategic analyst, producing deep insight based on systematic inquiry. He became someone that students, community leaders, and course instructors alike sought out regularly for advice and counsel on difficult or complex legal and organizational questions. I learned much from his contributions and came to respect him highly as a collaborator and peer, easily earning him the grade of A.

I also worked with Jermel in the Theater of Change, a January term, week long intensive course that brought together law students, people directly affected by incarceration, and artists to learn how to collaborate and explore ways to use law and policy to change the public narrative about incarceration and racism. Again, Jermel's role proved pivotal. He became an anchor of his project group, which focused on the problem of school suspensions and their disproportionate impact on children of color. As someone who has experienced the impact of incarceration on his own family, Jermel was a bridge across worlds, also able to translate complex legal concepts into clear and understandable terms. His unusual combination of rigorous legal analysis and creativity made him an invaluable and extraordinarily effective participant. I was not surprised when the Broadway Advocacy Coalition, Columbia Law School's partner in teaching the Theater of Change, selected Jermel to serve as the Policy Fellow for the following semester.

Throughout this work, I have watched Jermel create contexts in which difficult conversations about important questions take place in a constructive manner. I have observed him modeling how to learn from critical feedback, as well as to engage other people's arguments and still stand your ground. I have participated in many conversations in which it was his ability to bring competing perspectives into the conversation that enabled people to learn from those they disagreed with, and even rethink their own ideas. I have seen his pivotal role in producing unusually productive collaborations, resulting in the receipt of an unprecedented three anti-racism grants from the law school.

Jermel is an unusually gifted public speaker and facilitator. Faculty members, law students, and community members seek him out to facilitate events and panels at the law school. His performance as a facilitator make evident the power of his intellect, the depth of his insight, and the breadth of his commitment to shared learning and change.

With all of these amazing qualities, Jermel is a truly humble and empathetic human being. He has a great sense of humor, and is wonderful to work with. I am confident that Jermel will become a leader in the legal profession, and will make a major contribution to the advancement of social justice and the improvement of our legal system. He knows why he wants to clerk, and will bring all

Susan Sturm - ssturm@law.columbia.edu - 212-854-0062

of his talents and energies to bear on being successful in this important role. I have no doubt that he will make an outstanding law clerk. I give him my strongest recommendation.

Susan Sturm

Director, Center for Institutional and Social Change
George M. Jaffin Professor of Law and Social Responsibility
Columbia Law School

Jermel McClure, Jr.
Columbia Law School J.D. '24
914-216-2208
Jmm2496@columbia.edu

CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is a brief written for the National Black Law Students Association's 2021-2022 National Thurgood Marshall Moot Court Competition (formerly named Frederick Douglass Moot Court Competition). I was assigned to represent Petitioner, the United States of America. Respondents Michael Kyle, a.k.a Junior, Cole Brown, and Jazz Jefferies appeal the District Court's use of Sentencing Guidelines Commentary in determining that their prior felony convictions of attempt and conspiracy qualify as predicate offenses under U.S.S.G § 4B1.1. This case takes place in a fictitious jurisdiction, and accordingly, this brief contains citations to various circuit courts. This writing sample has been lightly edited for grammar.

No. 20-18933

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL KYLE, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE UNITED STATES

ELIZABETH PRELOGAR
Solicitor General,
Counsel of Record

BRIAN M. BOYNTON
Acting Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

Department of Justice
Washington, D.C. 20530-0001
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QUESTIONS PRESENTED

1. Whether attempt and conspiracy offenses qualify as predicate offenses under U.S.S.G. § 4B1.1 for the purposes of the Career Offender status.

2. Whether a parking structure connected to the place being robbed qualifies as a "different location" for the purposes of the abduction enhancement under U.S.S.G. § 2B3.1.